

# THE MEANS AND THE ENDS OF JUSTICE

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The interaction between socio-economic rights and administrative justice in

A South African democratic developmental state

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## Declaration

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*Solange Rosa, Cape Town, July 2017*

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## Summary

### *English*

The central focus of this thesis is to examine the substantive interaction between socio-economic rights and the right to administrative justice in addressing poverty under South African law. The hypothesis behind the research is that the normative purposes and values of socio-economic and administrative justice rights are profoundly complementary and can thus be strengthened as tools for addressing poverty. This analysis will be accomplished within the recognised context of a transformative constitutional framework and a democratic developmental state that is eminently powerful in its potential to remedy South Africa's past, to strive towards the egalitarian transformation of our society and to attain the concrete alleviation of the realities of poverty and hardship. The argument is firstly built on the concepts of transformative constitutionalism and participatory democracy, which characterise the South African Constitution and the South African developmental state. Our Constitution enables the socio-economic transformation of South African society from one which is racially divided and unequal to one which supports prosperity for all. In addition to addressing material deprivations of those in need, notions of participation and agency of poor and marginalised communities are central to achieving this transformation. Furthermore, over the past few years, the concept of South Africa as a developmental state as opposed to a welfare state, has taken root. A developmental state excels in the basics of public administration and intervenes strategically in the economy to promote socio-economic development. A fundamental feature of the discourse of the South African developmental state is that it must be people-oriented and capable of addressing the socio-economic needs of its entire population, especially the poor, marginalised and historically disadvantaged. It is argued that by developing the interlinkages between administrative justice and socio-economic rights, the vision of a democratic developmental state and effective socio-economic transformation can be supported. It is the current conception of the South African state that should frame the development of policy and law in the arena of poverty reduction, both in terms of substance and process.

## *Afrikaans*

Die hoofdoel van hierdie tesis is om die wesenlike interaksie tussen sosio-ekonomiese regte en die reg op administratiewe geregtigheid in die hantering van armoede ingevolge die Suid-Afrikaanse reg te ondersoek. Die hipotese vir die navorsing is dat die normatiewe doeleindes en waardes van sosio-ekonomiese regte en die reg op administratiewe geregtigheid mekaar inherent aanvul en dus versterk kan word as instrumente om armoede te hanteer. Hierdie ontleding word uitgevoer binne die erkende konteks van 'n transformasiegerigte konstitusionele raamwerk en 'n demokratiese ontwikkelingstaat wat oor besondere potensiaal beskik om Suid-Afrika se verlede reg te stel, na die egalitiese transformasie van ons samelewing te streef en die realiteite van armoede en swaarkry op konkrete wyse te verlig. Die argument word eerstens gegrond op die begrippe van transformasiegerigte konstitusionalisme en deelnemende demokrasie wat die Grondwet van die Republiek van Suid-Afrika en die ontwikkelingstaat kenmerk. Ons Grondwet stel ons in staat om 'n rasseverdeelde en ongelyke Suid-Afrikaanse samelewing sosio-ekonomies te transformeer tot een wat voorspoed vir almal ondersteun. Benewens die hantering van die materiële ontberinge van diegene in nood, is die deelname en wil van arm en gemarginaliseerde gemeenskappe van deurslaggewende belang om hierdie transformasie te bewerkstellig. Boonop het die konsep van Suid-Afrika as 'n ontwikkelingstaat eerder as 'n welsynstaat oor die afgelope paar jaar begin posvat. 'n Ontwikkelingstaat blink uit in die grondbeginsels van openbare administrasie, en onderneem strategiese ingrypinge in die ekonomie om sosio-ekonomiese ontwikkeling aan te moedig. 'n Wesenskenmerk van die diskoers oor die Suid-Afrikaanse ontwikkelingstaat is dat dit mensgerig moet wees en in die sosio-ekonomiese behoeftes van sy hele bevolking, veral arm, gemarginaliseerde en histories benadeelde mense, moet kan voorsien. Hierdie navorsing voer aan dat die visie van 'n demokratiese ontwikkelingstaat en doeltreffende sosio-ekonomiese transformasie ondersteun kan word deur die onderlinge verbande tussen administratiewe geregtigheid en sosio-ekonomiese regte te ontwikkel. Die huidige opvatting van die Suid-Afrikaanse staat behoort dus die inhoud sowel as die proses van beleids- en regsontwikkeling op die gebied van armoedeverligting te rig.

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*For my son, Keanan.*

Democracy is the government of the people, for the people, by the people.

- Abraham Lincoln

A functioning, robust democracy requires a healthy, educated participatory followership, and an educated, morally grounded leadership.

- Chinua Achebe

## Table of Contents

Declaration

Summary

Acknowledgements

Summary

Opsomming

Acknowledgements

Table of Contents

Detailed Table of Contents

Abbreviations

CHAPTER 1: Introduction

CHAPTER 2: Socio-economic transformation in a South African democratic developmental state

CHAPTER 3: Conceptualising poverty in a democratic developmental state

CHAPTER 4: Socio-Economic Rights to Address Poverty

CHAPTER 5: Administrative Justice to Address Poverty

CHAPTER 6: Socio-economic rights and administrative justice - Tackling poverty in a democratic developmental state

CHAPTER 7: Conclusion

Bibliography

## Detailed Table of Contents

DECLARATION .....	2
SUMMARY .....	3
TABLE OF CONTENTS .....	7
DETAILED TABLE OF CONTENTS .....	8
ABBREVIATIONS .....	11
CHAPTER 1: INTRODUCTION .....	13
1 1 BACKGROUND .....	13
1 1 1 <i>Poverty in South Africa</i> .....	13
1 1 2 <i>A Transformative Constitution</i> .....	13
1 1 3 <i>A democratic developmental state</i> .....	14
1 1 4 <i>Socio-economic rights and administrative justice</i> .....	15
1 2 RATIONALE AND MOTIVATION .....	18
1 2 1 <i>Using human rights law to address poverty and inequality</i> .....	18
1 2 2 <i>Applying an integrated human rights law approach to poverty reduction</i> .....	19
1 2 3 <i>Recognising the transformative complementarity of socio-economic rights and administrative justice to address poverty in a democratic developmental state</i> .....	20
1 3 RESEARCH AIMS AND HYPOTHESES .....	20
1 4 METHODOLOGY .....	22
1 5 OVERVIEW OF CHAPTERS .....	24
CHAPTER 2: SOCIO-ECONOMIC TRANSFORMATION IN A SOUTH AFRICAN DEMOCRATIC DEVELOPMENTAL STATE .....	28
2 1 INTRODUCTION .....	28
2 2 TRANSFORMATIVE CONSTITUTIONALISM .....	30
2 3 THE SOUTH AFRICAN DEMOCRATIC DEVELOPMENTAL STATE: IMPLICATIONS FOR SOCIO-ECONOMIC TRANSFORMATION .....	37
2 3 1 <i>The origins and characteristics of the “developmental state”</i> .....	39
2 3 2 <i>The evolution of the democratic developmental state</i> .....	42
2 3 3 <i>The South African democratic developmental state</i> .....	44
2 4 PARTICIPATORY DEMOCRACY .....	56
2 4 1 <i>Participatory democracy in theory</i> .....	57
2 4 2 <i>Participatory democracy in the South African Constitution</i> .....	62
2 5 CONCLUSION .....	67
CHAPTER 3: CONCEPTUALISING POVERTY FOR A DEMOCRATIC DEVELOPMENTAL STATE .....	68
3 1 INTRODUCTION .....	68
3 2 GLOBAL CONCEPTIONS OF POVERTY .....	69
3 3 SOUTH AFRICAN APPROACHES TO POVERTY .....	77



3 4 THE SITUATION OF POVERTY IN SOUTH AFRICA .....	80
3 4 1 <i>Education</i> .....	81
3 4 2 <i>Income</i> .....	82
3 4 3 <i>Employment</i> .....	84
3 4 4 <i>Housing and basic services</i> .....	86
3 4 5 <i>Health</i> .....	87
3 4 6 <i>Social exclusion and participation</i> .....	88
3 5 AN INTERDEPENDENT HUMAN RIGHTS-BASED APPROACH TO POVERTY .....	90
3 5 1 <i>The interdependence of human rights</i> .....	91
3 5 2 <i>A human rights-based approach to poverty</i> .....	93
3 6 CONCLUSION.....	102
<b>CHAPTER 4: SOCIO-ECONOMIC RIGHTS TO ADDRESS POVERTY .....</b>	<b>104</b>
4 1 INTRODUCTION .....	104
4 2 INTERNATIONAL LAW ON SOCIAL AND ECONOMIC RIGHTS .....	107
4 3 ADJUDICATING SOCIO-ECONOMIC RIGHTS IN A DEMOCRATIC DEVELOPMENTAL STATE .....	112
4 4 FROM JUDICIAL DEFERENCE TO JUDICIAL PROWESS.....	116
4 5 THE ESSENCE OF SUBSTANCE .....	122
4 5 1 <i>Nature of obligations under socio-economic rights</i> .....	123
4 5 2 <i>Models of review applied to negative and positive obligations in socio-economic rights jurisprudence</i> .....	126
4 5 3 <i>Evolution of reasonableness review</i> .....	128
4 5 4 <i>Shortcomings of reasonableness review since Mazibuko</i> .....	132
4 5 5 <i>Critique of reasonableness review: The absence of substance</i> .....	136
4 5 6 <i>“Minimum core” content</i> .....	139
4 6 PARTICIPATORY DIMENSIONS OF SOCIO-ECONOMIC RIGHTS JURISPRUDENCE .....	144
4 6 1 <i>Constitutional remedies in socio-economic rights cases</i> .....	145
4 6 2 <i>“Meaningful engagement”: Purpose and requirements</i> .....	149
4 6 3 <i>Substantive rights and systemic solutions</i> .....	153
4 6 4 <i>Obligation of the state to negotiate solutions in private evictions</i> .....	156
4 6 5 <i>Transformative “meaningful engagement” in a democratic developmental state</i> .....	160
4 6 6 <i>Enforcement of court orders through structural remedies</i> .....	163
4 7 CONCLUSION.....	168
<b>CHAPTER 5: ADMINISTRATIVE JUSTICE TO ADDRESS POVERTY.....</b>	<b>170</b>
5 1 INTRODUCTION .....	170
5 2 THE EVOLUTION OF ADMINISTRATIVE LAW IN A MODERN, DEVELOPING WORLD .....	173
5 3 ADMINISTRATIVE JUSTICE IN INTERNATIONAL LAW .....	175
5 3 1 <i>International human rights law</i> .....	176
5 3 2 <i>European Convention on Human Rights</i> .....	178
5 4 GLOBAL ADMINISTRATIVE LAW .....	181
5 5 SOCIO-ECONOMIC TRANSFORMATION AND ADMINISTRATIVE JUSTICE .....	185
5 5 1 <i>The Constitution, PAJA and the common law</i> .....	188
5 5 2 <i>The scope of administrative law</i> .....	190
5 5 3 <i>The content of the right to administrative justice: Substance and participation</i> .....	195
5 5 3 1 <i>Lawfulness and the principle of legality</i> .....	195

5 5 3 2 Reasonableness .....	202
5 5 3 3 Procedural fairness and participatory democracy .....	208
5 6 CONCLUSION.....	215
<b>CHAPTER 6: SOCIO-ECONOMIC RIGHTS AND ADMINISTRATIVE JUSTICE - REDUCING POVERTY IN A DEMOCRATIC DEVELOPMENTAL STATE .....</b>	<b>219</b>
6 1 INTRODUCTION .....	219
6 2 SOUTH AFRICAN JURISPRUDENCE: INTERDEPENDENCE OF HUMAN RIGHTS .....	220
6 2 1 Socio-economic rights and the rights to life, freedom, equality and dignity.....	221
6 2 2 Interdependence of participatory rights and socio-economic rights.....	222
6 3 ADJUDICATING SOCIO-ECONOMIC RIGHTS AND ADMINISTRATIVE JUSTICE IN A DEMOCRATIC DEVELOPMENTAL STATE .....	225
6 4 CHARACTERISTICS OF ADJUDICATION IN A DEMOCRATIC DEVELOPMENTAL STATE .....	228
6 4 1 Democratic experimentalism .....	229
6 4 2 Substantive incrementalism and systemic transformation .....	231
6 4 3 Managerialism.....	234
6 4 4 Autonomous institutions.....	236
6 5 DEMOCRATIC INCREMENTALISM .....	238
6 5 1 Democratic incrementalism: An adjudicatory approach.....	239
6 6 HOW CAN SOCIO-ECONOMIC RIGHTS AND ADMINISTRATIVE JUSTICE CONTRIBUTE TO THE REALISATION OF A DEMOCRATIC DEVELOPMENTAL STATE IN SA?.....	242
6 6 1 Enhancing democratic accountability and participation.....	242
6 6 2 Individual rights and developmental outcomes.....	247
6 6 3 “Reasonableness review” and substantive interpretation of rights.....	251
6 6 4 Participatory remedies and their enforcement.....	256
6 7 CONCLUSION.....	261
<b>CHAPTER 7: CONCLUSION .....</b>	<b>264</b>
7 1 INTRODUCTION .....	264
7 2 TRANSFORMATIVE CONSTITUTIONALISM IN A DEMOCRATIC DEVELOPMENTAL STATE .....	265
7 3 INTEGRATED HUMAN RIGHTS APPROACH TO POVERTY .....	266
7 4 SUBSTANTIVE RIGHTS AND PARTICIPATORY DEMOCRACY.....	267
7 5 CONCLUSION.....	271
<b>BIBLIOGRAPHY .....</b>	<b>272</b>
<b>APPENDIX A: TABLE OF SOCIO-ECONOMIC RIGHTS CASES .....</b>	<b>305</b>

## Abbreviations

ANC	African National Congress
ASGISA	Accelerated and Shared Growth Initiative of South Africa
BCLR	Butterworths Constitutional Law Reports
BEE	Black Economic Empowerment
CALS	Centre for Applied Legal Studies
CC	Constitutional Court
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CJ	Chief Justice
COHRE	Centre on Housing Rights and Evictions
COSATU	Congress of South African Trade Unions
CRC	Convention on the Rights of the Child
DBSA	Development Bank of South Africa
DPME	Department of Performance Monitoring and Evaluation
ECOSOC	Economic and Social Council
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
EU	European Union
GDP	Gross Domestic Product
GEAR	Growth, Employment and Redistribution Program
HIV/AIDS	Human Immunodeficiency Virus/Acquired Immune Deficiency Syndrome
HDI	Human Development Index
HOD	Head of Department
HSL	Household Subsistence Level
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
IFIs	International Financial Institutions
IGOs	Inter-Governmental Organisations

ILO	International Labour Organisation
IMF	International Monetary Fund
J	Judge
JA	Judge of Appeal
MDGs	Millennium Development Goals
MLL	Minimum Living Level
NCHR	Norwegian Centre for Human Rights
NDP	National Development Plan
NGO	Non-Governmental Organisation
NPC	National Planning Commission
OECD	Organisation on Economic Corporation and Development
PAIA	Promotion of Access to Information Act No. 2 of 2000
PAJA	Promotion of Administrative Justice Act No. 3 of 2000
PPPs	Public-Private Partnerships
RDP	Reconstruction and Development Plan
SAJHR	South African Journal of Human Rights
SCA	Supreme Court of Appeal
SDGs	Sustainable Development Goals
SGB	School Governing Body
SOE	State-Owned Enterprise
STATSSA	Statistics South Africa
TAC	Treatment Action Campaign
TB	Tuberculosis
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
UNICEF	United Nations Children's Fund
USA	United States of America
WHO	World Health Organisation

# CHAPTER 1: Introduction

## 1.1 Background

### 1.1.1 Poverty in South Africa

The purpose of the Constitution of the Republic of South Africa 1996, as stated in the Preamble, includes healing the divisions of the past and improving the quality of life of all citizens. The historical divisions and conditions of poverty that existed pre-apartheid continue to impact on South African society and manifest deprivation in a multitude of ways.<sup>1</sup> Twenty-two years after democracy arrived in South Africa, enduringly high levels of poverty and racial inequality are still evident in the high unemployment rate, low quality of education, spatial segregation, large expanses of informal settlements and high mortality rate. The current situation of poverty in South Africa and the trends over the past 22 years of democracy, do indicate improvements and reduction in poverty, in large part due to the widespread provision of a government “social wage” made up of social grants, free housing, free education, free health services, and free basic services for indigent people. However, the data distinctly demonstrates that poverty and inequality persists and therefore that substantial redress is still required in order to achieve the laudable aims of the Constitution, as laid out in the Preamble.<sup>2</sup>

### 1.1.2 A Transformative Constitution

It is widely accepted that the South African Constitution is a progressive and transformative document, the purpose of which is to regulate public power and to frame

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<sup>1</sup> For a historical account of the impact of colonialism, apartheid and capitalism on South African society, see S Terreblanche *A History of Inequality in South Africa: 1652–2002* (2002).

<sup>2</sup> See the latest data: Statistics South Africa, *Community Survey 2016* <<http://cs2016.statssa.gov.za>> (accessed 20-09-2017). The definition and measurement of poverty includes factors such as income, access to basic services, access to assets, human capital, political freedoms and social capital. This encapsulating approach to poverty allows for reflection on the experience of poverty and the multiplicity of interventions required to address it. See chapter three for a more in-depth discussion of the situation of poverty in South Africa and the conceptualisation of the multi-dimensionality of poverty.

“an objective, normative value system”<sup>3</sup> in a post-apartheid society. This system of normative values seeks to fulfil a constitutional imperative to remedy South Africa’s past and “transform our society into one in which there will be human dignity, freedom and equality”.<sup>4</sup> This is vividly expressed specifically in the Preamble to the Constitution, and then in section 7(1), in the Bill of Rights (Chapter 2) and generally throughout the Constitution.

In particular, the South African Constitution is internationally acclaimed for its inclusion of justiciable civil, political *and* socio-economic rights in the Bill of Rights. This prudence embodies the recognition that full transformation from an apartheid society requires both a reconfiguration of the legal-political structures that upheld it, as well as the transformation of the devastating social and economic consequences of its policies and laws. The overwhelming levels of poverty still felt to a disproportionate extent by those discriminated against during apartheid, severely undermine the transformation project if not addressed.<sup>5</sup>

### 1.1.3 A democratic developmental state

While South Africa still battles these numerous developmental challenges - especially in recent years, with declining economic growth rates - long-term, sustainable socio-economic transformation is crucial. The democratic developmental state theoretical framework, as adopted in the National Development Plan 2030, will be applied to South Africa’s recent experience and current situation in order to identify and explore the kind of institutional and policy reforms necessary for sustainable growth and development in South Africa. The central claim of this study is that competent, efficient and accountable state institutions and participatory processes are positively correlated with socio-economic development.

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<sup>3</sup> *Carmichele v Minister of Safety and Security and Another* 2001 (10) BCLR 995 (CC) para 54.

<sup>4</sup> *Soobramoney v Minister of Health (Kwazulu-Natal)* 1997 (12) BCLR 1696 (CC) para 8.

<sup>5</sup> Para 8.

Unlike in the Asian developmental states, rather than being inimical to development, democracy is integral to development in South Africa.<sup>6</sup> South Africa is founded on a representative, deliberative and participatory democracy. Nevertheless, only a very few African states have managed to fully implement the developmental state in actual terms. Botswana, Mauritius, South Africa and Uganda to a large extent, are seen as adopting the developmental state framework. However, despite the fact that in South Africa all sectors of society and bi-partisan politics largely adopted the National Development Plan ('NDP'), there is a lack of the requisite political leadership for coherent policy formulation and implementation of the NDP. South Africa post-apartheid fits with the categorisation of a democratic developmental state: the ongoing dire situation of poverty and inequality in the country requires a concerted socio-economic and democratic effort.<sup>7</sup>

#### 114 Socio-economic rights and administrative justice

The achievement of political and socio-economic transformation in a democratic developmental state requires a “collaborative enterprise”.<sup>8</sup> The legislature, the executive, the judiciary and all organs of state are all bound by the Bill of Rights and are obliged to “respect, protect, promote and fulfil” its mandates.<sup>9</sup> This “collaborative enterprise” is not only an obligation upon the state, but also upon non-state, private actors, to varying extents.<sup>10</sup> South Africans and civil society are also empowered to pressurise state and non-state actors to enforce these mandates through litigation, the political process,

<sup>6</sup> O Edigheji (ed) *Constructing a Democratic Developmental State in South Africa* (2010); T Mkandawire “Thinking about developmental states in Africa” *Cambridge Journal of Economics* 25 (2001) 289-313; P Evans *Embedded Autonomy: States and Industrial Transformation* (1995); P B Evans *What will the 21<sup>st</sup> Century Developmental State Look Like?* Paper presented at Conference at the Chinese University of Hong Kong (2006) (Unpublished. On file with the author); and United Nations Conference on Trade and Development (UNCTAD) *Reclaiming Policy Space: Domestic resource mobilization and developmental states* (2007) UNCTAD <[http://www.unctad.org/en/docs/aldcafrica2007\\_en.pdf](http://www.unctad.org/en/docs/aldcafrica2007_en.pdf)> (accessed 31-05-2016).

<sup>7</sup> O J David & L E Asuelime *The Theory and Practice of the Developmental State: A Comparative Assessment of South Africa's and Malaysia's Development* Regional Conference on Building Democratic Developmental States for Economic Transformation in Southern Africa 20 – 22 July 2015, Pretoria, South Africa <<http://www.developmentalstatesconference.com/wpcontent/uploads/2015/07/15-Lucky-Asuelime-and-David-Ojochenemi.pdf>> (accessed 31-05-2016).

<sup>8</sup> T Bollyky *The Role of Public Impact Litigation in Addressing the Conditions of the Poor in Post Apartheid South Africa* presented at the Foundation for Human Rights Conference Celebrating a Decade of Democracy: A focus on the last ten years of South Africa's Democracy and the advancement of rights (Durban 22-25 January 2004) 1.

<sup>9</sup> Section 7(2) and 8(1).

<sup>10</sup> Section 8(3) & (4).

involvement in public policy, law and administrative decision-making processes and political action. Accountability through the media, civil society organisations, the judiciary and independent public institutions is vital in a democratic developmental state.

Socio-economic rights in the South African Constitution are an important tool in litigation and for monitoring and advocacy to hold the government accountable for its obligations to secure for all members of society a basic set of goods – education, social security, health care, food, water, shelter, access to land and housing.<sup>11</sup> Justiciable socio-economic rights assist in ensuring the realisation of the State's constitutional obligations to the poor.<sup>12</sup> This dissertation will analyse what these rights have been able to accomplish for the poor and marginalised in South Africa since the end of apartheid 22 years ago, in the context of a democratic developmental state approach that seeks to reduce poverty through economic development, social welfare and empowerment. I will examine the courts' interpretation of the substantive content of socio-economic rights, the stance the courts have taken on participatory and procedural elements of these rights and the enforcement of remedies.

The right to just administrative action<sup>13</sup> is also a constructive tool for the assessment and enforcement of efforts to address poverty, and for ensuring an empowered voice for the poor and marginalised.<sup>14</sup> The right to administrative justice is an important vehicle for protecting socio-economic rights, for example in earlier cases on social security rights in

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<sup>11</sup> Sections 26, 27, 28(1)(c) and 29.

<sup>12</sup> S Liebenberg *Socio-Economic Rights - Adjudication under a Transformative Constitution* (2010); D Brand *Courts, Socio-economic Rights and Transformative politics* LLD thesis University of Stellenbosch (2009); K Klare "Legal culture and transformative constitutionalism" (1998) 14 *SAJHR* 151, 153; K Young, "A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review" (2010) 8 *International Journal of Constitutional Law* 385; See chapter four for a full discussion of the role of socio-economic rights in addressing poverty in a democratic developmental state. See chapter four for an extensive discussion of the role of socio-economic rights in addressing poverty in a democratic developmental state.

<sup>13</sup> Section 33.

<sup>14</sup> See for example *Premier, Mpumalanga, and Another v Executive Committee, Association of State-aided Schools: Eastern Transvaal* 1999 (2) BCLR 151 (CC) para 1; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 (9) BCLR 847 (CC) para 265. See chapter five for a detailed discussion of the substantive and procedural elements of the right to just administrative action, in the context of addressing poverty.



the High Courts.<sup>15</sup> More recently however, in cases relating to education, water, housing and basic services, the interpretation of administrative justice requirements of procedural fairness and reasonableness in particular, have brought mixed results for the realisation of socio-economic rights for the poor.<sup>16</sup> Since administrative law and administrative justice rights comprises the “general principles of law which regulate the organisation of administrative institutions and the fairness and efficacy of the administrative process,”<sup>17</sup> it can assist “in facilitating poor people’s right to be heard and to participate in socio-economic decision-making that affects their rights”<sup>18</sup> in a democratic developmental state. Furthermore, the right to reasonable administrative action plays a vital democratic role in requiring the administration to account for their decisions.

This dissertation portends two distinct ways in which the South African democratic developmental state impacts on the attainment of socio-economic transformation. The first is the critical role of the state in addressing poverty. The second is the relationship between the right to administrative justice and the socio-economic rights in the South

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<sup>15</sup> A series of successful court challenges have been brought under administrative law, by indigent individuals affected by the withdrawal of social security benefits amidst the ongoing systemic problems in the administration of social grants in the Eastern Cape. See *Bushula v Permanent Secretary, Department of Welfare, Eastern Cape* 2000 (2) SA 849 (E); *Mahambehala v Member of the Executive Council for Welfare, Eastern Cape Provincial Government* 2001 (9) BCLR 899 (SE); *Mbanga v Member of the Executive Council for Welfare* 2002 (1) SA 359 (SA); *Nomala v Permanent Secretary, Department of Welfare* 2001 (8) BCLR 844 (E); *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxusa*; *Rangani v Superintendent-General, Department of Health and Welfare, Northern Province* 1999 (4) SA 385 (T).

<sup>16</sup> See for example: *Mazibuko v City of Johannesburg* 2010 (3) BCLR 239 (CC) (not appropriate for a court to give a quantified content to what constitutes “sufficient water” and introduction of pre-paid water meters did not violate right to water, equality or just administrative action); *Joseph v City of Johannesburg* 2010 (3) BCLR 212 (CC) (required city authority to ensure procedural fairness before taking a decision to disconnect electricity supply of tenants); *Abahlali Basemjondolo Movement SA v Premier of the Province of Kwazulu-Natal* 2010 (2) BCLR 99 (CC) (affirmed legislative competence of province to pass Slums Act related to housing; procedural elements related to evictions in Slums Act deemed unconstitutional); *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (3) BCLR 177 (CC) (withdrawal of the function of a school governing body to determine the language policy of a school, the appointment of an interim committee and the subsequent alteration of the schools language policy by HOD were unlawful, however court ordered that right to education for excluded learners must be addressed by the school and HOD); *Nokotyana v Ekurhuleni Metropolitan Municipality* 2010 (4) BCLR 312 (CC) (MEC ordered to make decision on settlement upgrade, and rights to sanitation and lighting not recognised).

<sup>17</sup> L Baxter *Administrative Law* (1984) 54-55; C Hoexter *Administrative Law in South Africa* 2 ed (2012); and M Burns & M Beukes *Administrative Law under the 1996 Constitution* (2007) 3-72.

<sup>18</sup> Liebenberg *Socio-Economic Rights* 53.

African Constitution in addressing poverty. There is considerable literature on the former<sup>19</sup> and this dissertation is primarily concerned with the latter.

## 1.2 Rationale and motivation

### 1.2.1 Using human rights law to address poverty and inequality

A majority of South Africans still experience deeply entrenched poverty and inequality, twenty-two years after the end of apartheid. It is visible in structural socio-economic terms where many people still do not have access to housing, electricity, water, health care, employment and quality education. It is also expressed in the sense of frustration and disempowerment expressed and experienced by poor people.<sup>20</sup> Policy and legislative efforts to combat poverty and inequality over the past two decades have certainly made inroads and advanced democratic development in South Africa. The courts have also played an integral role in respecting, promoting, protecting and fulfilling the human rights of poor people.

The realisation of political and socio-economic transformation requires collaboration between the legislature, the executive, the judiciary and all organs of state, as well as the private sector. Human rights law can assist in combatting poverty and inequality by applying a normative framework to interventions or to inaction on the part of the state and non-state actors. The legacy of apartheid and the ongoing challenge of socio-

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<sup>19</sup> See F Cachalia “Separation of Powers, Active Liberty and the Allocation of Public Resources: The E-Tolling Case” (2015) 132(2) *SALJ* 285–312; S Friedman “Enabling Agency: The Constitutional Court and Social Policy” (2016) 91(1) *Transformation: Critical Perspectives on Southern Africa* 19–39; J Fowkes *Building the Constitution* (2016); J Fowkes “Latest Developments in the South African Court’s Most Expansive Socio-Economic Rights Doctrine – The Need for Meaningful Engagement about Meaningful Engagement” *Blog of the IACL, AIDC*, 9 August 2017 <<https://iacl-aidc-blog.org/2017/08/09/analysis-latest-developments-in-the-south-african-courts-most-expansive-socio-economic-rights-doctrine-the-need-for-meaningful-engagement-about-meaningful-engagement/>> (accessed 3-10-2017); J Klaaren “A Delicate Dialogue: Courts, the Executive and Social Policy in South Africa” in D Platjies (ed) *Future Inheritance: Building State Capacity in Democratic South Africa* (2011) 118–30; J Klaaren “A Second Look at the South African Human Rights Commission, Access to Information, and the Promotion of Socio-economic Rights” (2005) 2 *Human Rights Quarterly* 539–61; G Quinot (ed) *Administrative Justice in South Africa: An Introduction* (2015) chap 4; S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa’s Basic Law* (2013).

<sup>20</sup> See discussion of service delivery protests as evidence of inadequate service delivery as well as frustration at the lack of effective voice and participation in service delivery by poor people in: J Dugard “Urban Basic Services” in *Socio-economic Rights in South Africa: Symbols or Substance* (2015) 275-309, 286-291; and R Pithouse “The University of Abahlali baseMjondolo” (2007) <<http://abahlali.org/node/2814/>> (accessed 15-06-2017).

economic development means that South Africa is struggling to overcome high rates of poverty, defined broadly as multiple deprivations, including disempowerment. The underlying rationale for this dissertation is to contribute to the application of human rights law to the ongoing manifestations of poverty and inequality in order to ameliorate material conditions, as well as create a sense of agency and empowerment for people.

## 1 2 2 Applying an integrated human rights law approach to poverty reduction

The international and national human rights discourse on poverty reduction, requires a multi-dimensional approach in policy and law to address poverty. The multi-dimensional nature of poverty from a development economics' perspective is directly linked to the various socio-economic and civil and political rights identified in international human rights law and reflected in the South African Bill of Rights. Both socio-economic rights and civil and political rights, such as the right to freedom of information and administrative justice, are relevant to poverty reduction. As Amartya Sen pointed out in *Development as Freedom*,<sup>21</sup> the reduction of poverty needs to be tangibly felt through an individual experience of autonomy and empowerment *and* through a systemic experience of improvement in the actual living conditions of poor people.

The inclusion of justiciable civil, political and socio-economic rights in the Bill of Rights of the South African Constitution, symbolises an understanding that full transformation from an apartheid society requires both a reconfiguration of the legal-political structures that upheld it, as well as the transformation of the devastating social and economic consequences of its policies and laws. In this dissertation, I explore the complementarity of administrative justice and socio-economic rights, in how they can be interpreted and utilised to tackle poverty and inequality, in a democratic developmental state.

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<sup>21</sup> A Sen *Development as Freedom* (1999).

### 1.2.3 Recognising the transformative complementarity of socio-economic rights and administrative justice to address poverty in a democratic developmental state

The aims of a democratic developmental state for socio-economic transformation through economic progress coupled with social welfare, are intertwined with the need to lift people out of a sense of despair at their situation and empower them to be actively engaged in the development of the country. It also means that in the current state of South Africa, participatory democracy and accountability of public institutions are necessary to a developmental state. Due to the rapid transformations in the nature and structure of modern society and the rise in prominence of human rights, the realm of administrative law has begun to widen and deepen into socio-economic spheres. Societal and political changes, such as the rise of the welfare state and the developmental state, have had a significant impact on the role of contemporary administrative law. There is extensive debate about the political relationship between the judiciary, the executive and the legislature, and between private and public actors. In the present South African political, economic and legal dispensation, they have a direct and indirect impact on the ongoing situation of the poor. It is within this context that this dissertation proposes to investigate the complementary role of administrative justice and socio-economic rights that can better serve the transformative project of the Constitution, in a South African democratic developmental state.

### 1.3 Research aims and hypotheses

The primary research question investigated in this dissertation is the complementary contribution of socio-economic rights and administrative justice to tackling poverty and inequality, in a South African democratic developmental state. A number of cases related to the rights to social security, education, housing and water in particular, have come before the Constitutional Court over the past 22 years and illustrated the potential complementarity between socio-economic rights and the right to just administrative action in addressing poverty. However, the interdependence of these rights in the context of poverty has not been properly explored in the jurisprudence of the courts, or in the

legal literature, and therefore lacks conceptual clarity and coherence. In this dissertation I investigate the conceptual underpinnings of socio-economic rights and administrative justice in the South African Constitution with a view to elucidating their mutually supportive and reinforcing potential as partners in the project of poverty reduction in a democratic developmental state,<sup>22</sup> with distinct but interconnected roles to play.

The argument is firstly built on the concepts of transformative constitutionalism, participatory democracy and autonomy, which characterise the South African Constitution and the South African democratic developmental state. As introduced above, our Constitution enables the socio-economic transformation of South African society from one which is racially divided and unequal to one which supports prosperity for all. In addition to addressing material deprivations of those in need, mechanisms to support participation and agency of poor and marginalised communities are central to achieving this transformation.

Over the past decade, the concept of South Africa as a developmental state as opposed to a welfare state, has taken root, but unlike the Asian developmental states, needs to be imbued with the participatory and deliberative democratic notions embedded in our transformative Constitution.<sup>23</sup> A developmental state excels in the basics of public administration, maintains autonomous institutions and intervenes strategically in the economy to promote socio-economic development. A fundamental feature of the discourse of the South African developmental state is that it must be people-oriented, accountable and capable of addressing the socio-economic needs of its entire population, especially the poor, marginalised and historically disadvantaged. It is argued that by developing the interlinkages between administrative justice and socio-economic rights,

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<sup>22</sup> See footnote 2 above and the discussion of poverty in chapter three. Various terms are used to refer to anti-poverty measures. These include: poverty reduction, poverty relief, poverty alleviation and poverty eradication. Although they do not mean the same thing, the terms are often used interchangeably and without explanation. It is beyond the scope of this dissertation to provide a detailed discussion of the different terms, but suffice it to say that the term 'poverty reduction' is preferred and used throughout this dissertation. See <<http://www.worldbank.org/en/news/feature/2013/02/05/povertyreductioninpractice>> (accessed 22-09-2017).

<sup>23</sup> South African National Planning Commission "National Development Plan Vision 2030: Our Future – Make it Work" <<http://www.gov.za/speeches/national-development-plan-2030-31-aug-2016-0000>> (accessed 29-09-2016).

the vision of a democratic developmental state and effective socio-economic transformation can be supported. It is the current conception of the South African state that should frame the development of policy and law by the executive, the legislature and the judiciary in the area of poverty reduction, both in terms of substance and process, and the interpretation of socio-economic rights and administrative justice by the judiciary.

## 1.4 Methodology

Historically, poverty has been defined and measured in terms of money or income. Although the monetary poverty line approach provides a clear and accessible definition of absolute poverty and allows for various types of regional and global comparisons, it nonetheless has considerable shortcomings. More recently there is a trend towards a relative approach to poverty based on multiple dimensions.<sup>24</sup> The experience of poverty is thus being recognised as multi-faceted, subject to volatility and encompasses time and relativity elements. It takes into account the material and psychological deprivations experienced by the poor. There is also a much greater recognition of the non-material aspects of deprivation, such as inclusion, participation and empowerment.

This dissertation examines the multi-dimensional concept of poverty in development economics<sup>25</sup> and the international human rights approach to poverty reduction, which includes socio-economic rights, civil and political rights, and newer “hybrid” types of rights such as the right to administrative justice.<sup>26</sup> These empirical and theoretical foundations embody the notion that for an individual or community to truly be transformed and freed from the cycle of poverty, not only must their material needs be met, but their autonomy and participation in the decisions that affect their lives must

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<sup>24</sup> See the Multidimensional Poverty Index published for the first time in the 2010 Human Development Report <<http://www.hdr.undp.org/en/content/multidimensional-poverty-index-mpi>> (accessed 12-09-2015).

<sup>25</sup> See chapter three.

<sup>26</sup> Office of the United Nations High Commissioner for Human Rights (OHCHR) *Human Rights and Poverty Reduction: A Conceptual Framework* (2004); and *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies* (2006) <<http://www.ohchr.org/Documents/Publications/PovertyReductionen.pdf>> (accessed 10-07-2016).

also be respected. This is the premise of Amartya Sen's capability definition of poverty.<sup>27</sup> It says that poverty is multidimensional in nature and its opposite, well-being, can be thought of as the quality of a person's life. Thus, the level of well-being depends on whether and how well a person can do or be the things he or she has reason to value, for example how well a person can participate in the life of a community and be free from hunger. The concept of "capability" refers to a person's freedom or opportunities to achieve well-being in this sense.<sup>28</sup>

In order for the full impact of the rights in the Constitution to be felt amongst the poor, substance must be given to these rights, and not mere rhetoric. This dissertation therefore, analyses the content of socio-economic rights and administrative justice as interpreted by the Courts, for interlinkages and mutual reinforcement in overcoming multi-dimensional poverty and inequality. The primary role of socio-economic rights is the provision of the material needs of people, namely water, housing, income (social security), education and food. The primary role of the right to administrative justice in this context, is the facilitation of the right of recipients of government services to participate in the decisions affecting their access to such services, and to compel government actors to justify their conduct with reference to their constitutional obligations.

This dissertation will thus focus on the judicial interpretation and enforcement of socio-economic rights and administrative justice and their interaction in relation to addressing poverty and inequality in a democratic, developmental South Africa. I will explore a complementary judicial interpretation of socio-economic rights and administrative justice that can better serve the transformative project of the Constitution, by engaging with the normative purposes and values of socio-economic rights and the right to just administrative action.

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<sup>27</sup> A Sen "Well-being, agency and freedom: the Dewey lectures 1984" *Journal of Philosophy* (1985) 82; A Sen *Commodities and Capabilities* (1985); A Sen *Development as Freedom* (1999).

<sup>28</sup> Sen *Development as Freedom*. See also S Van Der Berg *A capabilities approach to the judicial review of resource allocation decisions impacting on socio-economic rights* LLD thesis University of Stellenbosch (2015).



## 1.5 Overview of chapters

The second chapter articulates the foundational, legal-philosophical and political-economy tenets of the dissertation. I discuss the origination and evolution of the concept of transformative constitutionalism in South Africa in relation to the goal of addressing poverty and inequality and as a normative framework for a South African democratic developmental state. Our transformative Constitution, and in particular the Bill of Rights, has a critical role to play in advancing poverty reduction through the courts, the legislature and the executive. I explore transformative constitutionalism as the foundation upon which the South African democratic developmental state is built and held to account.

This is followed by an overview of the history of the developmental state globally and in South Africa. This section explores the discourse of a South African *democratic* developmental state in government statements, policy pronouncements and documents after the end of apartheid in 1994. It examines the stated intention to move away from a welfare state, as the government seeks to address poverty and inequality through economic growth and long-term institutional capability. It then describes what constitutes a democratic developmental state - as defined by Peter Evans and termed the 21<sup>st</sup> century developmental state.<sup>29</sup>

The enhancement of human capabilities and the attainment of equity, two key aims of the democratic developmental state, requires the efficient provision of collective goods such as health, education and social welfare, which in turn depends on administrative capacity and democratic structures. Based on development theory, in particular Sen's work, Evans observes that development strategies and policy must be derived from democratic public deliberation.<sup>30</sup> Deliberative and participatory democratic institutions are thus essential elements of the South African democratic developmental state. In the

<sup>29</sup> P Evans "Constructing the 21<sup>st</sup> century developmental state: potentialities and pitfalls" in O Edigheji (ed) *Constructing a democratic developmental state in South Africa* (2010) 37-58.

<sup>30</sup> Evans "Constructing the 21<sup>st</sup> century developmental state" in *Constructing a democratic developmental state in SA*. His three strands of development theory are largely based on A Sen *Development as Freedom* (1999), the initiator of the "capability approach" in development theory. See chapter two.



chapter I then discuss the links between participatory and deliberative forms of democracy and broader attainment of socio-economic development. I explore Sen's notion of the "constituent" relationship between development and democracy, understood more broadly in the context of human lives,<sup>31</sup> as reinforcing the democratic developmental state.

The third chapter commences with a description of the multi-dimensional elements of poverty reflected in development economics. This is followed by a contextual description of the multi-dimensional situation of poverty in South Africa, which still requires widespread redress. I then set out the human rights discourse in relation to poverty reduction, at an international and national level. I also discuss those civil and political rights relevant to poverty reduction, as well as the right to administrative justice. The section will explore the links between the multi-dimensional nature of poverty from a development economics' perspective and the various socio-economic and participatory rights identified in international human rights law and in the South African Bill of Rights. A multi-faceted approach in policy and law is required to address poverty, both from a normative and experiential perspective of poverty. A South African democratic developmental state in designing and applying poverty reduction measures, needs to consider the tangible, lived experience of a lack of agency as well as the meagre living conditions of poor people in South Africa.

In chapters four and five I analyse the philosophical and historical underpinnings of socio-economic rights and just administrative action in the South African jurisprudence. The right to administrative justice and socio-economic rights are all instruments that can be sharpened further to tackle poverty and inequality in a democratic developmental state and thereby transform our society from its oppressive past.

The debate about the normative values and purpose of the socio-economic provisions of the 1996 Constitution and in particular, the judicial involvement in their realisation, is discussed in chapter four. This debate reflects the underlying tension within the

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<sup>31</sup> Sen *Development as Freedom* 347.

separation of powers doctrine as facilitating transformative constitutionalism under certain circumstances, and at the same time frustrating social justice through an overly deferential approach when the executive and administration neglects the needs and interests of the poor. The chapter sketches the typical fears raised regarding the role of the judiciary in relation to the ideological legitimacy of socio-economic rights, and the institutional legitimacy and competence of courts in socio-economic matters. It explores and expands the legitimate constitutional role of the South African Courts in a democratic developmental state. It looks at the substantive and collaborative interpretation of socio-economic rights in the Constitution, the evaluation of government compliance with the duties they impose, the adjudication of the validity of legislation and policy in the socio-economic realm and the remedies for state non-compliance with socio-economic obligations.

Chapter five provides a South African analysis of the potential (and actual) role of administrative law in poverty reduction, in relation to access to material benefits and poor people's sense of empowerment and autonomy over their lives. This conceptualisation of administrative justice will be placed alongside the work that socio-economic rights are able to do for the poor and marginalised, within a democratic developmental state. Due to the applicability of administrative justice to a wide spectrum of topics, the South African courts have considered a number of cases on the use of the right to just administrative action to protect and advance the interests of the poor. In chapter five, the history, scope of application and content of this right is firstly outlined and thereafter the efficacy and substance of the right in cases related to social security, housing, water and education rights is analysed.

Finally, in chapter six, I explore the interdependence of human rights in the South African jurisprudence, with a focus on socio-economic and administrative justice rights. I make suggestions for a proactive, substantive, democratic adjudicatory approach for the courts, in order to strengthen the conceptual interconnections of socio-economic rights and administrative justice, and thereby advance a South African democratic developmental

state. I then examine the critical issues regarding the interaction between socio-economic rights and administrative justice in relation to addressing poverty in a democratic developmental state: the scope of application of socio-economic rights and administrative justice; the corresponding duties under these rights; the overlap and complementarity of reasonableness review; the concept of “meaningful engagement” and its synergy with procedural fairness; and remedies and their enforcement. I outline a complementary judicial interpretation of socio-economic rights and administrative justice that can better serve the transformative project of the Constitution.

## CHAPTER 2: Socio-economic transformation in a South African democratic developmental state

### 2.1 Introduction

Mass poverty in its various guises, continues to present a considerable challenge for South Africa.<sup>32</sup> Notwithstanding ongoing debates about how best to describe and measure poverty, while poverty remains very widespread, the available data points to a reduction in extreme destitution in recent years. This is to a large extent due to the redistributive targeting and successful impact of a number of laws, policies and programmes aimed at addressing poverty and inequality implemented in the country since the demise of apartheid. The transformation from a racially-based, resource-biased society to an egalitarian one where all enjoy the aims, values and rights upheld in our Constitution, requires a concerted effort by all institutional players to redress the material as well as the psycho-socio-political deficiencies that continue to inhibit the full enjoyment of our new democracy for approximately half the population.

This chapter articulates the theoretical, legal-philosophical and political-economy tenets of the dissertation, beginning with the goal of transformative constitutionalism. The origin and evolution of the concept of transformative constitutionalism in South Africa and what it means in the context of the goal of addressing poverty and inequality will firstly be discussed. The Constitution, and in particular the Bill of Rights, has a critical role to play in advancing poverty reduction through the courts, the legislature and the executive. The rights to life, equality, dignity, administrative justice and socio-economic rights, it will be argued, are all instruments that can be sharpened further to tackle poverty and inequality and thereby transform our society from its shackled past.

Transformative constitutionalism is the legal-philosophical framework for the South African democratic developmental state (evolved from a welfare state) as it seeks to

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<sup>32</sup> See chapter three.

eradicate poverty and inequality. The democratic developmental state must be underpinned by the values of participatory democracy and autonomy in its quest to achieve an egalitarian society free of poverty. I argue that the South African government's shift in the last decade from a welfare state approach to a developmental state approach, both in its discourse and its long-term plans and policies, accentuates the need for the state to be more interventionist in the economy in order to address poverty and inequality and for giving individuals more autonomy over their own development.<sup>33</sup> I outline the political-economy underpinnings of the South African government's historical and current policy responses to poverty reduction and inequality and the collaborative role of all players in society in the democratic development project.

In the following sections I analyse the links between public reasoning, democracy and the attainment of socio-economic justice, as fundamental to a *democratic* developmental state. Sen argues that the attainment of social justice, without public reasoning based on participatory and deliberative democratic models, is not possible. I then examine the participatory and deliberative dimensions of democracy in the South African Constitution that support the transformation project. These aspects of the Constitution aid the development of South Africa by providing a voice for people deeply affected by poverty and mechanisms for deliberation on solutions and participation in decision-making. I argue that administrative justice can potentially play a complementary role to socio-economic rights in a transformative constitution for the poor and marginalised, as well as to the notion of a *democratic* developmental state in addressing poverty and inequality.

This chapter thus lays the theoretical foundations for the investigation of the interconnectedness of socio-economic rights and administrative justice in addressing poverty in a South African democratic developmental state that follows in the subsequent

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<sup>33</sup> See for example the following perspectives of South Africa's "neo-liberal" model of development, as opposed to a democratic developmental state approach: UNRISD "Redistributive, Neo-liberal or New Paradigm: New Directions in Social Policy in South Africa" (March 2015) <[http://www.unrisd.org/80256B3C005BCCF9/\(httpAuxPages\)/0AB630FF08F614C1C1257E22003056F5/\\$file/PB11e%20NDSP%20South%20Africa.pdf](http://www.unrisd.org/80256B3C005BCCF9/(httpAuxPages)/0AB630FF08F614C1C1257E22003056F5/$file/PB11e%20NDSP%20South%20Africa.pdf)> (accessed 20-07-2016); S Vally & E Motale (eds) *Education, Economy and Society* (2012). I argue here that the National Development Plan, industrial policy and other economic policies reflect at least on paper, a developmental state approach.

chapters. It is argued that in the context of widespread poverty, the work that socio-economic rights and administrative justice can do together to support the poor to access material benefits, as well as to have a say over the form and delivery of those benefits and rights, is equally necessary to overcome poverty. Participation and empowerment are central means and ends in our transformative Constitution, as well as in the notion of a South African democratic developmental state.

## **2.2 Transformative constitutionalism**

This section will discuss the origin, content and implications of the concept of transformative constitutionalism in South Africa, against the backdrop of the situation of poverty and inequality sketched above and as an overarching legal and normative framework for a South African democratic, developmental state. A brief account of the concept of “transformative constitutionalism”, in the context of the South African Constitution, is presented here in order to lay the legal-philosophical foundations for the role of socio-economic rights and administrative justice in addressing poverty and inequality in a democratic developmental state. The notion of “transformative constitutionalism” supported herein embraces both an outcomes-based and an institutional reform view, as it links to the need for substance and form in remedying the situation of poverty faced by many in the country.<sup>34</sup> An outcomes-based view refers to the achievement of the visible amelioration of the situation of poverty for millions of people, where, for example, access to housing, quality education and health services results in improved quality of life and educational attainment. An institutional view refers to the processes that must ensure the integrity of the institutions, the effective fulfilment of their role and the inclusion of the voices of poor people in determining the substance of poverty reduction interventions. The Constitution, and in particular the Bill of Rights, has a critical role to play in advancing poverty reduction through the courts, the legislature and the executive, in an evolving democratic, developmental state.

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<sup>34</sup> See D Brand *Courts, Socio-economic Rights and Transformative politics* LLD thesis University of Stellenbosch (2009) 4 and footnotes 12, 13, 14 and 15. I support what Danie Brand refers to as a “results-oriented” interpretation of transformative constitutionalism, at the same time as supporting the need for reform “of the institutions and systems that produce results themselves” as an integral part of transformation.

It is widely acknowledged that the South African Constitution is a progressive and transformative legal instrument.<sup>35</sup> As the supreme law, its purpose is to regulate public power and to frame “an objective, normative value system”<sup>36</sup> in a post-apartheid society. All law and conduct must conform to its provisions, failing which it is invalid. It is argued here that it applies equally to the formulation of conceptions of the state and its relationship to the economy, society and citizens, discussed below as the democratic, developmental state. This system of normative values seeks to fulfil a constitutional imperative to remedy South Africa’s past and “transform our society into one in which there will be human dignity, freedom and equality”,<sup>37</sup> and is vividly expressed in the Preamble to the Constitution, and then in section 7(1),<sup>38</sup> in the Bill of Rights (Chapter 2) and throughout the Constitution.

The South African Constitution embraces notions of participatory democracy, social, and economic equality, protection of culture, openness, and transparency. As Karl Klare points out in his seminal article:

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<sup>35</sup> See discussion of the “transformative” vision of the Constitution and the difficulties and potential of achieving this vision through the constitutional jurisprudence of the courts in C Albertyn and B Goldblatt “Facing the challenges of transformation: Difficulties in the development of an indigenous jurisprudence of equality” (1998) 14 *SAJHR* 248; A J van der Walt “Tentative urgency: Sensitivity for the paradoxes of stability and change in the social transformation decisions of the Constitutional Court” (2001) 16 *SAPR/PL* 1-27; D Moseneke “The fourth Bram Fischer memorial lecture: Transforming adjudication” (2002) 18 *SAJHR* 309; H Botha, A J van der Walt and J van der Walt (eds) *Rights And Democracy in a Transformative Constitution* (2003); H Botha “Metaphoric reasoning and transformative constitutionalism (part 2)” (2003) 1 *TSAR* 20-36; M Pieterse “What do we mean when we talk about transformative constitutionalism?” (2005) 20 *SAPL* 155-166; A J van der Walt “Legal history, legal culture and transformation in a constitutional democracy” (2006) 12 *Fundamina* 1-47; S Liebenberg “Needs, rights and transformation: Adjudicating social rights” (2006) 1 *Stell LR* 5-36; P Langa “Transformative constitutionalism” (2006) 17(3) *Stell LR* 351-60; and Liebenberg *Socio-Economic Rights* 23-78.

<sup>36</sup> *Carmichele v Minister of Safety and Security and Another* 2001 (10) BCLR 995 (CC) para 54.

<sup>37</sup> *Soobramoney v Minister of Health (Kwazulu-Natal)* 1997 (12) BCLR 1696 (CC) para 8. See also Liebenberg *Socio-Economic Rights* 25-28.

<sup>38</sup> 7. Rights.-

(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

“[T]he South African Constitution, in sharp contrast to the classical liberal documents, is social, redistributive, caring, positive, at least partly horizontal,<sup>39</sup> participatory, multicultural, and self-conscious about its historical setting and transformative role and mission.”<sup>40</sup>

His was the first explicit characterisation of the South African Constitution as transformative, from a political, economic and social perspective. This view of the Constitution took hold firmly and has been quoted many times in academic literature and court judgments.<sup>41</sup> The transformative nature of the Constitution provides a legal normative framework to guide “the redress of the injustices of the past as well as to facilitate the creation of a more just society in the future”.<sup>42</sup> The conception of a democratic, developmental state must necessarily be guided then by transformative notions of participatory democracy, openness, transparency, accountability and socio-economic development, and embedded in the institutions that facilitate the delivery out of poverty. Klare described the South African Constitution as a “transformative” project in the following terms:

“[A] long-term project of constitutional enactment, interpretation and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to *transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction*. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.”<sup>43</sup>

<sup>39</sup> Section 8(2): “A provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.” See also s 8(3). In addition, the equality provision, section 9(4) is explicitly horizontally applicable.

<sup>40</sup> K Klare “Legal culture and transformative constitutionalism” (1998) 14 SAJHR 151, 153.

<sup>41</sup> See *S v Makwanyane* 1995 (6) BCLR 665 (CC) para 262; *Du Plessis v De Klerk* 1996 (5) BCLR 658 (CC) para 157; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (7) BCLR 687 (CC) paras 73–74; *Minister of Finance v Van Heerden* 2004 (11) BCLR 1125 (CC) para 142; *City of Johannesburg v Rand Properties (Pty) Ltd* 2006 (6) BCLR 728 (W) paras 51–52; *Rates Action Group v City of Cape Town* 2004 (12) BCLR 1328 (C) para 100; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 (9) BCLR 847 (CC) paras 343, 344, 360; and *Head of Department: Mpumalanga Department of Education v Hoërskool* 2010 (3) BCLR 177 (CC) para 77.

<sup>42</sup> Liebenberg *Socio-Economic Rights* 25.

<sup>43</sup> Klare (1998) 14 SAJHR 150 [emphasis added].



Marius Pieterse describes the South African Constitution as an essentially social-democratic model, quite distinct from the traditional, liberal model of constitutionalism, and links this understanding to at least three critical aspects that make the constitution “transformative”.<sup>44</sup>

Firstly, the South African Constitution mandates the achievement of substantive equality and social justice through the provisions of sections 9, 26, 27, 28 and 29. Section 9 of the Constitution incorporates the concept of substantive equality, which involves a contextual group-based approach to discrimination and domination and requires remedial measures designed to rectify the destructive effects of entrenched structures of past oppression. The achievement of substantive equality also necessitates that the material consequences of social and economic subjugation be addressed.<sup>45</sup> These ends are further supported by the inclusion of justiciable civil, political and socio-economic rights in the Bill of Rights.<sup>46</sup> This embodies recognition that full transformation from an apartheid society requires both a reconfiguration of the legal-political structures that upheld it, as well as the transformation of the devastating social and economic consequences of its policies and laws. The overwhelming levels of poverty still felt to a disproportionate extent by those discriminated against during apartheid, will undermine the transformation project if not addressed.

Socio-economic rights have increasingly been used as a tool in litigation and in monitoring and advocacy related to the government’s obligations to secure for all members of society a set of social goods – education, social security, health care, food,

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<sup>44</sup> For a summary of the literature on the meaning of “transformative constitutionalism” see Pieterse (2005) 20 *SAPL* 156. Though he acknowledges that his interpretation of the concept is not the only tenable one, nor should it restrict other interpretations of transformative constitutionalism. A summation of the concept is presented here as a key theoretical argument in this dissertation, that a transformative interpretation of the Constitution lends itself to supporting the project of reducing poverty and inequality in the country, in particular through socio-economic rights and administrative justice. Substance and process are required for true transformation.

<sup>45</sup> Pieterse (2005) 20 *SAPL* 160; Albertyn and Goldblatt (1998) 14 *SAJHR* 250-251, 253; Moseneke (2002) 18 *SAJHR* 318-319; S Liebenberg and M O’Sullivan (2001), “South Africa’s new equality legislation: A tool for advancing women’s socio-economic equality?” *Acta Juridica* 73 at 81.

<sup>46</sup> Sections 26, 27, 28 and 29 protect the rights to housing, health care, food, water, social security and education, as well as the rights of children to basic nutrition, shelter, basic health care services and social services.

water, shelter, access to land and housing.<sup>47</sup> Justiciable socio-economic rights assist in monitoring the State's progressive realisation of its constitutional obligations to the poor, and ultimately holding the State accountable to these obligations. However there are limits to what these rights have been able to achieve. This is due, in particular, to the reluctance of the court to properly engage with the substance of socio-economic rights, the deference the courts have shown in the granting of remedies and the difficulties experienced in relation to the enforcement of these remedies.<sup>48</sup>

Secondly, the achievement of political and socio-economic transformation requires a "collaborative enterprise".<sup>49</sup> The legislature, the executive, the judiciary and all organs of state are all bound by the Bill of Rights and are obliged to "respect, protect, promote and fulfil" its mandates.<sup>50</sup> This collaborative enterprise is not only an obligation upon the state, but also upon non-state actors.<sup>51</sup> As Pieterse states, "much of substantive inequality is rooted in private interrelations",<sup>52</sup> therefore, comprehensively addressing "socially structured patterns of domination" and "the imbalances in private power, is accordingly integral to the transformation project".<sup>53</sup>

Finally, linked to this is the fostering of a "culture of justification"<sup>54</sup> for every exercise of public power, where public power is kept in check for compliance with human rights standards as essential for the transformative project.<sup>55</sup> Pieterse argues that this is starkly provided for in section 36 of the Constitution, which determines that rights may only be

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<sup>47</sup> Analysis of the jurisprudence and literature on socio-economic rights as a tool in addressing poverty will be undertaken in chapter four, including the evolving concept of "meaningful engagement" and participation in socio-economic rights, which ties into administrative justice and participatory democracy.

<sup>48</sup> See K Young, "A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review" (2010) 8 *International Journal of Constitutional Law* 385; B Ray, "Evictions, Aspirations and Avoidance" (2013) 5 *Constitutional Court Review* 173-232; and K Young "Avoidance of Substance in Constitutional Rights" (2013) 5 *Constitutional Court Review* 233-243. See chapter four for a full discussion of the role of socio-economic rights in addressing poverty in a democratic developmental state.

<sup>49</sup> T Bollyky *The Role of Public Impact Litigation in Addressing the Conditions of the Poor in Post Apartheid South Africa* presented at the Foundation for Human Rights Conference Celebrating a Decade of Democracy: A focus on the last ten years of South Africa's Democracy and the advancement of rights (Durban 22-25 January 2004) 1.

<sup>50</sup> Section 7(2) and 8(1) of the Constitution.

<sup>51</sup> Section 8(3) and (4). Section 39(2).

<sup>52</sup> Pieterse (2005) 20 *SAPL* 161.

<sup>53</sup> Pieterse (2005) 20 *SAPL* 161.

<sup>54</sup> See Mureinik "A Bridge to where? Introducing the interim Bill of Rights" (1994) 10 *SAJHR* 31.

<sup>55</sup> Pieterse (2005) 20 *SAPL* 161, 163.

limited by laws that are reasonable and justifiable in “an open and democratic society based on human dignity, equality and freedom”. It can also be derived from reasonableness review in sections 26(2) and 27(2), which requires an “exercise in proportionality informed by a proper analysis of the normative commitments of the relevant rights and the impact of the deprivation of the particular resource or service at issue on the claimant group”.<sup>56</sup> The rights of access to information (section 32) and just administrative action (section 33) similarly play a critical role in societal transformation in that they seek to keep a check on public power by providing citizens with the information and procedural and substantive protection required for empowerment and autonomy of the poor and vulnerable in our society.<sup>57</sup> The right to just administrative action<sup>58</sup> is an increasingly constructive tool, for the assessment and enforcement of efforts to address poverty and inequality, and is thereby transformative.<sup>59</sup> It focuses on the implementation of legislation<sup>60</sup> based on the broad, overarching requirements of lawfulness, procedural fairness and reasonableness - elements which require a “culture of justification” when rights are at risk.<sup>61</sup> The reasonableness component of administrative justice, in particular, insists on substantive justification for all public action.<sup>62</sup>

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<sup>56</sup> See Liebenberg *Socio-Economic Rights* 163-198 discussion on reconceiving reasonableness in substantive terms, and at 198.

<sup>57</sup> See section 2.5 below and chapter five.

<sup>58</sup> Section 33 of the Constitution:

“1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

3) National legislation must be enacted to give effect to these rights and must

(a) provide for the review of administrative action by a court or, where appropriate an independent and impartial tribunal,

(b) impose a duty on the state to give effect to the rights in subsection (1) and (2); and

(c) promote an efficient administration.”

<sup>59</sup> See further chapter five on the potential of administrative justice to support transformative constitutionalism.

<sup>60</sup> See the exclusion of s 85(2)(b) of the Constitution from the definition of administrative action in section 1 of Promotion of Administrative Justice Act 3 of 2000 (PAJA).

<sup>61</sup> Note that section 33(2) includes the right to be given reasons for administrative action, in circumstances where rights have been adversely affected.

<sup>62</sup> See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (7) BCLR 687 (CC) paras 44-45, and *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd* 2006 (8) BCLR 872 (CC) paras 187-188. In both cases, O'Regan J affirmed that under the 1996 Constitution and PAJA, the review functions of the court now have a substantive as well as a procedural ingredient. In assessing the reasonableness of administrative action, the circumstances of a case are critical and there are a number of factors which are relevant to determining whether a decision is reasonable or not and which require the court

As was said in *Premier, Mpumalanga*, there are two constitutional imperatives arising out of the South African transformative Constitution, in relation to addressing poverty: substantive redress and procedural fairness.<sup>63</sup> The challenge is to find a proper balance between these two constitutional imperatives.<sup>64</sup> This inquiry attempts to find a harmony of form and substance in the context of a transformative project that is mired in political and ideological challenges.<sup>65</sup> I argue that the right to administrative justice and socio-economic rights can do for social justice and poverty reduction can be complementary if the provisions are interpreted procedurally as well as substantively. In chapters four and five I conduct an analysis and evaluation of the case law on socio-economic rights and administrative justice, in search of a mutually supportive interpretation of these rights in a democratic developmental state.

Finally, of relevance to this thesis, is the distinction Danie Brand<sup>66</sup> draws between two understandings of transformative constitutionalism amongst legal commentators: the first “equates transformation with the achievement of certain tangible results or outcomes”<sup>67</sup> such as the reduction of poverty, through adjudication; the second, with which Brand aligns himself, “refers to the radical change of the institutions and systems

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to look into the substance of the decision. Factors to determine whether a decision is reasonable include: “the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected.” See further chapter five for an in-depth discussion of the substantive and procedural elements of the right to just administrative action, in the context of addressing poverty.

<sup>63</sup> *Premier, Mpumalanga, and Another v Executive Committee, Association of State-aided Schools: Eastern Transvaal* 1999 (2) BCLR 151 (CC) para 1.

<sup>64</sup> See *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 (9) BCLR 847 (CC) para 265.

<sup>65</sup> See discussion of the classical liberal undertones of South African legal culture which have been hindering the progress of transformative constitutionalism in South Africa namely “formalism, deference to legislative choices, and dichotomous conceptions of negative and positive rights, public and private law, law and politics”, in: M Pieterse “Coming to terms with judicial enforcement of socio-economic rights” (2004) 20 *SAJHR* 383 at 396-399; R Teitel “Transitional Jurisprudence: The role of law in political transformation” (1997) 106 *Yale LJ* 2009-2080 at 2056; Klare (1998) 14 *SAJHR* 152. See a thorough discussion of and response to the limiting influence of classic liberal legal culture on transformative constitutionalism in Liebenberg *Socio-Economic Rights* 43-75.

<sup>66</sup> *Brand Courts, Socio-economic Rights and Transformative Politics* 2-3.

<sup>67</sup> *Brand Courts, Socio-economic Rights and Transformative Politics* 2-3 and notes 4-6.

that produce results themselves” including “their processes, manner of operation, modes of reasoning and ways of doing things.”<sup>68</sup>

In this dissertation, I embrace both of the above understandings of transformative constitutionalism as I set out to discuss the role and jurisprudence of the courts in relation to socio-economic rights and administrative justice, in a democratic, developmental state. I argue that transformative constitutionalism and a democratic, developmental state requires that the courts should aspire to contribute to a reduction in poverty in terms of material outcomes, at the same time using its adjudicatory powers and powers of judicial review to examine and influence “the systems and institutions themselves” in terms of “their processes” and “modes of reasoning”. The participatory and empowerment elements in achieving socio-economic justice require a less quantifiable – but no less important – account of the role of courts in facilitating socio-economic transformation, through the rights to administrative justice and the participatory elements of socio-economic rights in a democratic, developmental state.

### **2.3 The South African democratic developmental state: Implications for socio-economic transformation**

Over the past decade, there has been a shift by the South African government, away from the market-oriented economic-policy approach towards a more “developmental state” approach. This is primarily driven by the focus on the need for public-sector action to remove binding constraints to growth through a range of strategic public-sector interventions.<sup>69</sup> The concept of the “developmental state” emerged out of East Asia in the

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<sup>68</sup> Brand Courts, *Socio-economic Rights and Transformative Politics* 4-5 and notes 12-15. See Nancy Fraser’s distinction between “affirmative” and “transformative” redistribution in N Fraser “Social justice in the age of identity politics: Redistribution, recognition, and participation” in N Fraser & A Honneth *Redistribution or Recognition? A Political-Philosophical Exchange* (2003) 7, 45-46. She explains “affirmative redistribution” as seeking “to redress maldistribution by altering end-state patterns of allocation, without disturbing the underlying mechanisms that generate them”, and hence they are superficial as they “leave intact the deep political-economic structures that generate injustice”. “Transformative redistribution” on the other hand, “seeks to redress end-state injustices precisely by altering the underlying framework that generates them.”

<sup>69</sup> See national macro-economic policy documents: National Treasury *Growth, Employment and Redistribution* (GEAR) (1996) NT <<http://www.treasury.gov.za/publications/other/gear/chapters.pdf>> and The Presidency *Accelerated and Shared Growth Initiative for South Africa* (ASGISA) (2005) Presidency

1980's and 1990's and is generally used to mean a state that drives development, in contrast to a wholly free-market approach, in a centralised manner.<sup>70</sup> It embodies particular economic and political connotations for policies and institutional make-up of states.

The concept of a developmental state has evolved into the 21<sup>st</sup> Century and been adapted to the South African democratic context as a “democratic developmental state”.<sup>71</sup> Broadly speaking, the discourse in South Africa describes a state that is determined to influence the direction and pace of economic development by directly intervening in the development process, rather than relying on the uncoordinated influence of market forces to allocate resources. This is achieved through collaboratively establishing substantive social and economic goals to guide the long-term process of development and placing responsibility on all actors to collectively strive towards those goals,<sup>72</sup> and is encapsulated in the *National Development Plan 2030*.<sup>73</sup>

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<[http://www.thepresidency.gov.za/electronicreport/downloads/volume\\_4/business\\_case\\_viability/BC1\\_Research\\_Material/asgisa.pdf](http://www.thepresidency.gov.za/electronicreport/downloads/volume_4/business_case_viability/BC1_Research_Material/asgisa.pdf)> (accessed 30-05-2016).

<sup>70</sup> See discussions on the evolution of the concept of a “developmental state” from East Asia in C Johnson *MITI and the Japanese Miracle: The Growth of Industrial Policy 1925-1975* (1982); A Amsden *Asia's next Giant: South Korea and Late Industrialisation* (1989); R Wade *Governing the Market: Economic Theory and the Role of Government in East Asian Industrialisation* (1990); Z Onis “The logic of the developmental state” *Comparative Politics* Vol.24 No.1 (1991) 109-126; M Woo-Cumings (ed) *The Developmental State* (1999), and in particular C Johnson “The Development State: Odyssey of a Concept” 32, in that volume; P Evans *Embedded Autonomy: States and Industrial Transformation* (1995); P B Evans *What will the 21<sup>st</sup> Century Developmental State Look Like?* Paper presented at Conference at the Chinese University of Hong Kong (2006) (Unpublished. On file with the author); and United Nations Conference on Trade and Development (UNCTAD) *Reclaiming Policy Space: Domestic resource mobilization and developmental states* (2007) UNCTAD <[http://www.unctad.org/en/docs/aldcafrica2007\\_en.pdf](http://www.unctad.org/en/docs/aldcafrica2007_en.pdf)> (accessed 31-05-2016).

<sup>71</sup> See W Gumede *Delivering the democratic developmental state in South Africa* DBSA Development Planning Division Working Paper Series No.9 (2009); and various chapters in O Edigheji (ed) *Constructing a Democratic Developmental State in South Africa* (2010).

<sup>72</sup> For discussions on South Africa's evolution from a welfare state to a developmental state see: M Pieterse “Beyond the Welfare State: Globalisation of neo-liberal culture and the constitutional protection of social and economic rights in South Africa” *Stellenbosch Law Review* (2003) 1-28; G Rapholo “Towards becoming a developmental state: A focus on poverty alleviation” *Service Delivery Review* Vol 2 No 3 (2003) 24-27; R Levin “Building service effectiveness: Integrated governance and the developmental state” *Service Delivery Review* Vol 3 No 1 (2004) 28-35; O Edigheji (ed) *Constructing a Democratic Developmental State in South Africa: Potentials and Challenges* (2010); R Southall “Introduction: Can South Africa be a developmental state?” in S Buhlungu, J Daniel, R Southall & J Lutchman (eds) *State of the Nation: South Africa 2005-2006* (2006) pp. xvii-viv; COSATU “A developmental state for South Africa?” (2005); S Gelb “A South African developmental State: What is possible?” Paper presented at the Harold Wolpe Memorial Trust's Tenth Anniversary Colloquium, “Engaging silences and unresolved issues in the political economy of South Africa” 21-23 September 2006, Cape Town, South Africa; and B Fine *The curious incidence of the developmental state in the night-time* Paper



This section will briefly describe the origins and characteristics of 20<sup>th</sup> century “developmental states”, particularly looking at the economically successful East Asian states. Then the political-economy underpinnings of the South African government’s historical and current policy responses to poverty reduction and inequality will be elaborated and linked to the transformative constitutional project and the role that socio-economic rights and administrative justice can play.

The main proposition of this section is that South Africa can be categorised as an emerging democratic developmental state due to its developmentalist approach, the interventionist role of the state, the emergent institutional support for the state’s capacity to realise its developmental objectives, the collaborative enterprise and the acknowledgement of participatory democracy that lies at the heart of the transformation project. The analysis in this section focuses on the ideological underpinning of the South African state, the institutional dimensions of the developmental state and aspects of procedural democracy and challenges thereto.

### 2.3.1 The origins and characteristics of the “developmental state”

The concept of a “developmental state” arose from an endeavour by Chalmers Johnson to generalise about the model pursued by many of the East Asian nations post the Second World War, in order to rapidly modernise their economies. In his well-known study of Japan’s modernisation, Johnson characterised the basic framework of the East Asian “developmental state” as one where the state sets specific development goals and then mobilises society to achieve industrial modernisation.<sup>74</sup> The idea of “a centralised state interacting with the private sector from a position of pre-eminence so as to secure development objectives”<sup>75</sup> is generally called the “developmental state” theory. Analysing these processes, Johnson pointed out four critical elements in the Japanese developmental

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presented at the SANPAD Poverty Conference, 26-30 June 2007, Durban, South Africa SOAS <<http://eprints.soas.ac.uk/5611/>> (accessed 31-05-2016).

<sup>73</sup> National Planning Commission *National Development Plan 2030: Our future – make it work* 2012 Presidency <<http://www.gov.za/issues/national-development-plan-2030>> (accessed 12-09-2015).

<sup>74</sup> See generally Johnson *MITI and the Japanese Miracle*.

<sup>75</sup> Wade *Governing the Market* quoted in Gumede *Delivering the democratic developmental state* 4.

state: firstly the bureaucracy was assigned the tasks of planning, constructing and supervising industry; secondly a political system was established to support the bureaucracy; thirdly when the government wanted to intervene in the market, it left plenty of scope for activities of private enterprises; and lastly, political direction was given by the Ministry of International Trade and Industry.<sup>76</sup>

Since Johnson, the developmental state has been defined differently by scholars and development agencies alike. Some scholars tend to emphasise the role of the state. In this category are scholars like Manuel Castells, who define a developmental state “as one which establishes - as its principle of legitimacy - its ability to promote and sustain development, understood as the combination of steady high rates of economic growth and structural change in the productive system, both domestically and in its relationship with the international economy”.<sup>77</sup>

Other scholars have stressed the organisational features of the developmental state. They identify that a developmental state must also have the capacity to formulate and implement its developmental agenda. Key structural characteristics are autonomy of state institutions, which enables it to define and promote its strategic developmental goals, and its “embeddedness” - that is, “a concrete set of social ties that binds the state to society and provides institutionalised channels for the continual negotiation and renegotiation of goals and policies”.<sup>78</sup> According to this perspective, autonomy implies the presence of high degrees of coherent state agencies that are able to formulate and implement coherent developmental goals. A significant feature of the autonomous state is greater coordination of industrial change and economic adjustment.

Thandika Mkandawire’s definition aptly captures both the structural and ideological features of a developmental state. He defines the developmental state as one where the

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<sup>76</sup> See generally Johnson *MITI and the Japanese Miracle*.

<sup>77</sup> M Castells “Four Asian Tigers with a dragon head: A comparative analysis of the state, economy and society in the Asian Pacific Rim” in R Appelbaum & J Henderson (eds) *States and Development in the Asia Pacific Rim* (1992) 56. See also Gumede *Delivering the democratic developmental state* 4-6, who provides a useful summary of the common characteristics of East Asian developmental states.

<sup>78</sup> Evans *Embedded Autonomy* 12.



main ideological underpinning is a “developmentalist” one, in that the state must ensure economic progress. The institutional aspect of the definition requires the state to have the capacity to implement economic policies discerningly and effectively. Institutional capacity relies on institutional, technical, administrative and political factors. This type of state must be autonomous and strong enough to devise long-term economic policies and not be captured by private sector interests. Finally, the developmental state must be accountable so that it does not use its autonomy in an illegitimate manner and enables it to gain the support of key social actors.<sup>79</sup>

Though not widely acknowledged in the literature, developmental states at the same time also implemented social policies, focusing on non-state entities such as families and firms, with the State implementing social welfare programmes.<sup>80</sup> While the effective coordination of the economy is the priority, it is also important to ensure minimal bureaucratic failure.<sup>81</sup> Substantial efforts were made to ensure more equitable development through land reform, relevant education and training, support for small enterprise and provision of housing and infrastructure.<sup>82</sup> Improvements in social protection focused on measures that would reduce the cost of employment and raise productivity. Support for light industry resulted in the rapid rise of employment, which in turn laid the basis for raising living standards without considerable increase in pure welfare spending. Increasing employment was supported by restrictions on retrenchment and elevated spending on skills development.<sup>83</sup>

In summary, the concept of a developmental state has a particular intellectual history, grounded primarily in the experience of industrialisation in East Asian states. It emphasises the ability of the state to drive development by guiding capital toward new activities – achieved under largely authoritarian and centralised governance. East Asian

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<sup>79</sup> T Mkandawire “Thinking about developmental states in Africa” *Cambridge Journal of Economics* 25 (2001) 289-313, 290.

<sup>80</sup> Edigheji *Constructing a Democratic Developmental State* 9-10.

<sup>81</sup> See example of South Korea in E Kim “Limits of the authoritarian developmental state of South Korea” in O Edigheji (ed) *Constructing a Democratic Developmental State in South Africa* (2010) 97, 111.

<sup>82</sup> Gumede *Delivering the democratic developmental state* 6.

<sup>83</sup> Gumede *Delivering the democratic developmental state*.

developmental states reached their developmental goals under authoritarian conditions in dominant party democratic systems.

## 2.3.2 The evolution of the democratic developmental state

Peter Evans provides the theoretical grounding for the *democratic* developmental state – what he terms the 21<sup>st</sup> century developmental state.<sup>84</sup> The 21<sup>st</sup> century democratic developmental state that Evans depicts is grounded in three strands of development theory: the “new growth theory”; “institutional approaches”; and the “capability approach” or theory of “capability expansion”.<sup>85</sup> These theories converge into Evan’s main proposition that “enhancing human capabilities”, as both means and ends, is the central goal of the 21<sup>st</sup> century developmental state. This is not just a welfare goal but simultaneously is critical for sustained economic growth because “investment in human capital has the potential to lead to social inclusion and economic growth.”<sup>86</sup> Furthermore, this latter approach places great importance on equity concerns. Similar to the Asian developmental states, equity is a focal goal and institutional architectures must be designed and policies promoted to attain that goal.<sup>87</sup>

Evans argues that the state capacities required for the enhancement of human capabilities and the attainment of equity, are the efficient provision of collective goods. This in turn depends on both administrative capacity and political foundations that are anchored in “active democratic structures”.<sup>88</sup> The latter is also a foundation for effective economic management. Effective provision of public goods, including health, education, social

<sup>84</sup> P Evans “Constructing the 21<sup>st</sup> century developmental state: potentialities and pitfalls” in O Edigheji (ed) *Constructing a democratic developmental state in South Africa* (2010) 37-58. See also: M Zenawi “States and market: the neoliberal limitations and the case for developmental state” in *Good Growth and Governance in Africa: Rethinking Development Strategies* edited by Akbar Noman, Kwesi Botchwey, Howard Stein and Joseph E. Stiglitz (2012); R Wade *Rethinking Industrial Policy for Low Income Countries* African Development Bank (2009).

<sup>85</sup> Evans “Constructing the 21<sup>st</sup> century developmental state” in *Constructing a democratic developmental state in SA*. His three strands of development theory are largely based on A Sen *Development as Freedom* (1999), the initiator of the “capability approach” in development theory. See section 2.6 below.

<sup>86</sup> Edigheji *Constructing a Democratic Developmental State in SA* 13.

<sup>87</sup> Edigheji *Constructing a Democratic Developmental State in SA* 13. Edigheji defines “equitable growth” as: “a high rate of economic growth combined with equitable distribution of income and wealth, with egalitarianism meaning that all segments of society are able to share in the benefits of growth”.

<sup>88</sup> Evans “Constructing the 21<sup>st</sup> century developmental state” in *Constructing a democratic developmental state in SA* 38.

welfare and the like, is a manifestation of social citizenship, enhancing the well-being of ordinary citizens; and public goods are themselves major economic infrastructure required by market agents.<sup>89</sup>

Based on development theory, in particular Sen's work, Evans notes that because development is about human well-being, "development strategies and policy cannot be formulated by technocrats, but must be derived from democratically organised public deliberation".<sup>90</sup> Deliberative and participatory democratic institutions are thus essential to 21<sup>st</sup> century development.<sup>91</sup> In light of this theoretical foundation, Evans presents the 21<sup>st</sup> century model of the developmental state as fundamentally different to the Asian developmental state and rather more similar to the Nordic social democratic developmental state where human welfare and public policy is driven by deliberative mechanisms that are more inclusive than those just made up of government and the private sector. Evans refers to these deliberative mechanisms as "encompassing embeddedness", or as "synergistic state-society relations".<sup>92</sup>

In discussing the links between participatory and deliberative forms of democracy and broader attainment of development, Sen argues that you cannot separate an assessment of development from the actual reality of the lives that people lead and the real freedom they experience. He describes development as more than the improvement of "inanimate objects of convenience", such as a rise in economic growth rates or employment rates or individual incomes – "important as they may be as means to the real ends". The value of these "inanimate objects of convenience" depends on what they actually do to enhance the lives and freedom of the people involved. That is what Sen sees as intrinsic to the idea of development. He states that the relationship between development and democracy, understood more broadly in the context of human lives, should be seen "partly in terms of their *constitutive connection*, rather than only through their external links". He posits

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<sup>89</sup> Evans "Constructing the 21<sup>st</sup> century developmental state" in *Constructing a democratic developmental state in SA* 38.

<sup>90</sup> Evans "Constructing the 21<sup>st</sup> century developmental state" in *Constructing a democratic developmental state in SA* 43.

<sup>91</sup> Edigheji *Constructing a Democratic Developmental State in SA* 14.

<sup>92</sup> Edigheji *Constructing a Democratic Developmental State in SA* 14.

that “political liberties and democratic rights are among the constituent components” of development, irrespective of whether or not they contribute to economic growth.<sup>93</sup>

This conceptual framing by Evans and Sen, leads me to the discussion of the evolution of a democratic, developmental South African state and how this notion can be adapted to suit our transformative constitutional democracy in support of broad-based, collaborative socio-economic transformation. This is the notion of the state that best underpins and articulates the institutional and developmental outcomes needed to advance South Africa, as framed by a transformative constitution.

### 2.3.3 The South African democratic developmental state

There is no definitive conception of the developmental state in South Africa in the academic literature and policy documents of government, the ruling African National Congress (‘ANC’) party and its alliance partners, the South African Communist Party (‘SACP’) and the Congress of South African Trade Unions (‘COSATU’). The literature and policy documents are filled with rhetoric and ideology with reference to the developmental state. Nevertheless, the concept is useful as an evolving political and economic framework for South Africa’s socio-economic transformation. This section will attempt to summarise the common threads and elements in the concept and propose a framework based on Evans’ theoretical construction outlined above, which lends itself to supporting socio-economic transformation in a South African democratic developmental state. A successful South African developmental state would thus be very well-placed to be both developmental and democratic.

South Africa’s transition to democracy took place under changing global conditions. These were characterised by the collapse of the communist bloc and the ascendancy of neo-liberal market ideology. A key element of this ideology argued for the primacy of the market over the state. This was in stark contrast to the newly elected ANC government’s

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<sup>93</sup> A Sen *The Idea of Justice* (2009) 347.

Reconstruction and Development Programme ('RDP'),<sup>94</sup> which called for a strong interventionist and redistributive state. The RDP focused on meeting basic needs, developing the country's human resources, building the economy and democratising the state and society. The RDP document defines development in terms of a growing economy in which redistribution is a critical element post-apartheid. It includes the preservation and development of human resources in the form of skills training, job-creation and the provision of education, health services, basic services, infrastructure and an adequate social security system. It also strongly embeds the notions of representative and participatory democracy.<sup>95</sup>

During the first decade of freedom, some progress was achieved in addressing RDP priorities,<sup>96</sup> but global pressure saw government adopt the Growth, Employment and Redistribution ('GEAR') policy framework. Left-orientated social movements, trade unions and commentators saw this framework as a shift towards identifying the market as the supreme agent for resource allocation and an acknowledgement that the inherited formal economy would be the determinant of growth and development.<sup>97</sup> One consequence of the adoption of GEAR was that development priorities, including the provision of social services and economic infrastructure, were subject to fiscal discipline, cost recovery and financial sustainability.<sup>98</sup> GEAR is widely acknowledged to have succeeded in bringing about macro-economic stability, but has been criticised for its limited ability to equitably distribute the economic benefits of stability and substantially reduce poverty and inequality in the country.<sup>99</sup>

In a context of resource scarcity, growing inequality and ongoing wide-spread poverty, strategic choices on where and how to invest scarce resources to maximise social and economic return became imperative in South Africa. Since GEAR, market failure in

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<sup>94</sup> *White Paper on Reconstruction and Development*, Cape Town, 15 November 1994 <<http://www.gov.za/sites/www.gov.za/files/governmentgazetteid16085.pdf>> (accessed 31-05-2016).

<sup>95</sup> *White Paper on Reconstruction and Development*.

<sup>96</sup> See section 2.2 on the situation of poverty and trends in South Africa since democracy.

<sup>97</sup> See for example COSATU's explicit rejection of GEAR <<http://www.cosatu.org.za/show.php?ID=2159>> (accessed 07-12-2016).

<sup>98</sup> Edigheji *Constructing a Democratic Developmental State in SA* 12-13.

<sup>99</sup> Edigheji *Constructing a Democratic Developmental State in SA* 12-13.

addressing the above-mentioned developmental challenges provided a strong rationale for government intervention. This position was reinforced by a resurgent belief in the role of the state as a driver of economic development, where government leads growth creation and identifies the major beneficiaries of growth through active interventions, such as infrastructure investment, job creation, State-Owned Enterprise ('SOE') initiatives, sector and small enterprise support, industrial policy, targeted procurement and directed spatial development.<sup>100</sup> In fulfilling its developmental role, government recognised its position as a key facilitating, partnering and collaborative economic agent through planning, fixed investment and developmental spending. Public investment therefore became a key mechanism for the achievement of higher GDP growth, as this guides private investment decisions and facilitates social and economic spin-offs.<sup>101</sup>

The Accelerated and Shared Growth Initiative for South Africa ('ASGI-SA') economic policy framework announced by the government in late 2005 confirmed the return into policy discourse of the role of the state, as compared with the mid-1990s. The focus on state spending on infrastructure and skills development, and the selection of priority sectors both signified a central role for the state in the economy. In the context of ASGI-SA and of its more general Black Economic Empowerment ('BEE') strategy, the state identified four relevant developmental objectives. The first was to broaden the base of BEE and in particular to promote the emergence of a black business class involved in producing goods and services. The second was to provide broader access to public goods and services to the marginalised and excluded poor (the so-called "second economy"), including infrastructure provision, education and skills training, and information about economic opportunities. The third objective was to reduce the costs of doing business in South Africa, especially by lowering indirect costs beyond the shop floor, that is, transport, communications, logistics and institutional aspects of the business environment, by undertaking a massive infrastructure expenditure programme. The

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<sup>100</sup> Edigheji *Constructing a Democratic Developmental State in SA* 12-13.

<sup>101</sup> Edigheji *Constructing a Democratic Developmental State in SA* 12-13.

fourth was to directly create semi-skilled employment by promoting labour intensive exports of services.

Increasingly, over the past ten years, the state has thus asserted the goal of building and consolidating a strong developmental state in South Africa - a developmental state that excels in the basics of public administration and intervenes strategically in the economy to promote socio-economic transformation.<sup>102</sup> As growth has slowed since the global financial meltdown in 2008 and millions of jobs have been lost in South Africa, this goal has become more vital.

Fine divides the discourse on the developmental state in South Africa into two schools, the economic and the political.<sup>103</sup> The economic school focuses on the economic policies that the state needs to adopt in order to bring about development, namely through the array of interventions associated with the East Asian model, especially protection, export promotion, targeted investment and finance. The political school, on the other hand, is more or less entirely concerned with addressing the issue of whether the state has the capacity and motivation to adopt and implement developmental policies. In particular, the focus is upon whether the state has the autonomy, both to adopt policy independent of special interests and to deploy that independence for broader developmental aims.<sup>104</sup>

The reason for the lack of consensus on the definition of a developmental state in the literature appears to be that the developmental state has sprung into South African discourse from the political arena and has, until recently, largely been rhetorical and unexamined. In a 1998 ANC discussion document, *The State, Property Relations and*

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<sup>102</sup> T Manuel *Budgeting Challenges in the Developmental State* Speech by the Minister of Finance at Senior Management Service Conference in Cape Town (2004) *National Treasury* <[http://www.treasury.gov.za/comm\\_media/speeches/2004/2004092001.pdf](http://www.treasury.gov.za/comm_media/speeches/2004/2004092001.pdf)> (accessed 29-07-2016); and T Mbeki *Address of the President of South Africa* on the occasion of the budget vote of the Presidency: National Assembly, Cape Town (07-06-2006) *Department Foreign Affairs* <<http://www.dfa.gov.za/docs/speeches/2006/mbek0607.htm>> (accessed 29-07-2016).

<sup>103</sup> Fine *The curious incidence of the developmental state*.

<sup>104</sup> Fine *The curious incidence of the developmental state*. As J Howell "Reflections on the Chinese State" *Development and Change* Vol 37 No 2 (2006) 273, 275, puts it, "the notion of the developmental state, too, has become vulnerable to semantic overload, ideological appropriation and empirical amorphousness". It leads him to adopt the notion of "a polymorphous state that reveals contradictory features of developmentalism and predation, rivalry and unity, autonomy and clientelism, efficiency and inefficiency, across time and space".



*Social Transformation*, the character of the state is defined as developmental. It further says “development is about improving the quality of life; it is about equity and justice... entails growing the economy”.<sup>105</sup> It made only passing reference to state capacity to intervene in order to facilitate growth and development. Although it did not define the institutional characteristics that would constitute the transformative capacity of the developmental state, the document did recognise the need to mobilise civil society to participate in the formulation and implementation of public policies.

The ANC National Policy Conference Report (2007) states that:

“However, to characterise monopoly capital as an enemy of the NDR would be too simplistic. Rather our approach ... should be to build a strong developmental state, with the strategic capacity and the instruments to deal with these negative tendencies, while at the same time mobilising private capital in general to partner the state in increasing rates of investment and job-creation.”<sup>106</sup>

The ANC Policy Conference Report goes on to state that broad consensus is needed to build a developmental state that aspires to the following attributes:

“[H]aving the capacity to intervene in the economy in the interest of higher rates of growth and development; effecting interventions that address challenges of unemployment, poverty and underdevelopment; *mobilising the people as a whole, especially the poor, to act as their own liberators through participatory and representative democracy.*”<sup>107</sup>

Finally, the report states that “[w]e are building a developmental state and not a welfare state given that in a welfare state, dependency is profound”. It is clear from the report that the ANC did not want to replicate wholesale the concept of the developmental state from the Asian or any other model, but rather to develop its own indigenous South

<sup>105</sup> ANC *The State, Property Relations and Social Transformation* (1998) ANC <<https://amadlandawonye.wikispaces.com/1998,+ANC,+State,+Property+Relations,+Social+Transformation>> (accessed 29-07-2016).

<sup>106</sup> ANC *National Policy Conference Report* (2007) ANC <<http://www.anc.org.za/content/2007-national-policy-conference>> (accessed 29-07-2016).

<sup>107</sup> ANC *National Policy Conference Report* (2007) ANC <<http://www.anc.org.za/content/2007-national-policy-conference>> (accessed 29-07-2016) [own emphasis added].



African model. This model sees intervention in the economy as generating higher rates of inclusive growth and employment as a means to end poverty and promoting participatory democracy where the poor can “act as their own liberators”.

Various SACP policy documents, as well as articles in the *African Communist*, also apply the concept of the developmental state to South Africa.<sup>108</sup> But the focus has been on the role of the state. Here again there is a similarity between the ANC and the SACP definition of the role of the developmental state. In one such article, “Economic Transformation”, in the *African Communist* of 1998, the role of the developmental state is spelt out as “providing essential social services, creating conditions to achieve development-orientated growth, promoting redistribution and responding to market failure”.<sup>109</sup> No attempt was made to elaborate on the developmental state’s transformative capacity. However, like the ANC (and unlike the situation in the Asian states), it stressed the importance of the state not foregoing interaction with capital while aligning itself to “a progressive/worker dominated movement”.<sup>110</sup> While it is safe to conclude that the SACP has not developed a comprehensive state transformative capacity theory, its conception of the developmental state bears resemblance to Evans’ broad concept of embeddedness.

It seems that COSATU both lacks a coherent position on the developmental state and that the trade union movement has been wary about the construction of a developmental state in South Africa. A critical examination of its documentation shows that it tends to define the developmental state from an ideational standpoint. This is amply evident in a draft discussion paper for its 2005 Central Committee meeting. It defines the developmental state as one that “drives development, in contrast to a free market approach”.<sup>111</sup> This state, for the labour federation, is defined by both its class, as well as its

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<sup>108</sup> Available at <[www.sacp.org.za](http://www.sacp.org.za)> (accessed 29-07-2016).

<sup>109</sup> SACP “Economic Transformation” in the *African Communist* Issue 149 (1998).

<sup>110</sup> SACP “Economic Transformation” in the *African Communist* Issue 149 (1998).

<sup>111</sup> COSATU “A developmental state for South Africa?”. COSATU suffered a major split in 2014 when eight of its member unions joined the National Union of Metalworkers of SA (Numsa) to support the federation’s then general secretary, Zwelinzima Vavi. Unions that remained in the federation include the National Union of Mineworkers, the National Education, Health and Allied Workers’ Union and the South African Democratic

economic policy – intervening in the economy to develop new industries. But at another level it says that the developmental state has the ability “to drive development by guiding capital toward new activities while maintaining broad-based support, including from workers”.<sup>112</sup>

According to a previous Minister of Finance, Trevor Manuel:

“A developmental state is one that is determined to influence the direction and pace of economic development by directly intervening in the development process, rather than relying on the uncoordinated influence of market forces to allocate resources.”<sup>113</sup>

This is a reflection of the shifts in South Africa’s economic policy over the past decade with an emerging consensus towards greater government intervention. Manuel, quoting Sen’s book, *Development as Freedom*, stated that “[t]he task of a developmental state is to fight poverty and expand economic opportunities for the poor.” The developmental state has since appeared in the speeches of a range of Ministers over the last ten years, both during the Mbeki era and under President Jacob Zuma.<sup>114</sup> It also underpins the National Development Plan 2030, released in 2012 by the National Planning Commission and the Presidency.<sup>115</sup>

In his first State of the Nation address as President of South Africa in 2009, Jacob Zuma announced a continued commitment to building a developmental state, improving public

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Teachers Union. A major source of contention was the unions’ independence in relation to political organisations. The split was also related to the ANC’s internal power struggles between those supporting President Zuma and those who are either independent or support deputy president Cyril Ramaphosa. See The Conversation “Cracks in the ANC’s alliances are showing” 26 July 2016 <<https://theconversation.com/cracks-in-south-africas-governing-alliance-could-cost-the-anc-dearly-63022>> (accessed 26-07-2016).

<sup>112</sup> COSATU “A developmental state for South Africa?” 4.

<sup>113</sup> Manuel *Budgeting Challenges in the Developmental State*.

<sup>114</sup> State of the Nation addresses available at <<http://www.thepresidency.gov.za>> (accessed 29-07-2016).

<sup>115</sup> President Jacob Zuma appointed the National Planning Commission in May 2010 to draft a vision and national development plan for South Africa. The Commission is an advisory body consisting of 26 people drawn largely from outside government, chosen for their expertise in critical areas. The Commission consulted widely on the plan. They held public forums with thousands of people, had discussions with parliament, the judiciary, national, provincial and local government, development finance institutions, state-owned enterprises, unions, business, religious leaders and non-profit organizations. See the National Development Plan 2030 <<http://www.gov.za/issues/national-development-plan-2030>> (accessed 29-07-2016).

services and strengthening democratic institutions.<sup>116</sup> In order to achieve this, he committed to: establishing two Ministries in the Presidency to strengthen strategic planning and performance monitoring and evaluation; involving State-Owned Enterprises and Development Finance Institutions in government planning processes and improving the monitoring and evaluation of their performance; putting people first in service delivery administration; ensuring professional services from staff in all government departments; and “a more interactive government”.<sup>117</sup>

In his State of the Nation Address, 2010, President Jacob Zuma reaffirmed his commitment to build a strong developmental state – “a state that responds to the needs and aspirations of the people, and which performs better”. He elaborated that the government is building a performance-oriented state, by improving planning as well as performance monitoring and evaluation. Furthermore, he committed to five priorities: education, health, rural development and land reform, creating decent work, and fighting crime, with education and skills development at the centre of the government’s policies.

Gumede and others identify a number of essential conditions for a successful South African democratic developmental state.<sup>118</sup> First, it requires the political will and a long-term developmental vision based on broad national consensus amongst political parties, civil society, business and organised labour, to industrialise and modernise.<sup>119</sup> This requires mature, quality leadership and determination on the part of the country’s

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<sup>116</sup>JG Zuma *State of the Nation Address* (03-06-2009) Presidency <<http://www.thepresidency.gov.za>> (accessed 29-07-2016). Despite these commitments, President Zuma has been mired in controversy for various reasons including, but not limited to, hundreds of corruption charges, patronage, rape charges, use of public resources for private benefit, nepotism and state capture in his dealings with the Gupta family, dismissal of the Public Protector’s role as a democratic institution and so on. South Africa’s economic decline has also been vividly seen and felt in the millions of jobs lost over the past five years whilst he has been President. All of this has seriously undermined the potential for building a democratic developmental state under President Zuma’s leadership.

<sup>117</sup> Zuma *State of the Nation Address* (2009).

<sup>118</sup> Gumede *Delivering the democratic developmental state*. See also Edigheji *Constructing a Democratic Developmental State in South Africa*.

<sup>119</sup> See Mont Fleur Scenarios <<http://www.montfleur.co.za/about/scenarios.html>>; SA Scenarios 2025: The future we chose? <[http://www.gov.za/sites/www.gov.za/files/sascenarios2025\\_0.pdf](http://www.gov.za/sites/www.gov.za/files/sascenarios2025_0.pdf)>; and Dinokeng Scenarios <<http://www.dinokengscenarios.co.za>> (accessed 29-07-2016). These scenario exercises were developed at different points in South Africa’s recent history, with the participation of a wide spectrum of society for purposes of identifying a long-term vision for the country, which would then be translated into a plan. Presidency *National Development Plan*.

political elite. All stakeholders must then implement a holistic vision collaboratively, based on an integrated long-term development plan. Successful long-term development plans integrate action for the short term, medium term and long term. A long-term development plan is crucial for the identification of the core priorities of a nation. But these development plans must have public and stakeholder legitimacy.<sup>120</sup> The National Development Plan, whilst still somewhat contested,<sup>121</sup> is such a plan.

Second, a fundamental feature of the South African democratic developmental state is that it must allow for participation and be capable of addressing the socio-economic needs of its entire population, especially the poor, marginalised and historically disadvantaged. The South African democratic developmental state must be the kind of state that fosters the empowerment of people as opposed to their “dependency” on the state. It is vital that ordinary people are involved in the process of development and as they get more involved, they must also own the process. Whenever policies are developed which are aimed at addressing existing socio-economic imbalances, ordinary people should be involved. The most critical aspect of this kind of developmental state is participatory democracy.

Third, at the core of the developmental effort is an efficient, well-coordinated state, staffed with skilled employees. The state must have the administrative, technical and political capacity and competency to facilitate the setting of national goals, develop the right policies to deliver on those goals and implement these policies. This also means that widespread corruption and the policy of cadre deployment, nepotism and patronage must be systematically abolished. Furthermore, the most successful developmental states had a central coordinating centre driving socio-economic transformation.<sup>122</sup> This centre not

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<sup>120</sup> Gumede *Delivering the democratic developmental state* at 11 explains that although most of the East Asian developmental states were autocratic, their development plans had wider legitimacy among the key stakeholders in society. In Malaysia for example, the New Economic Policy – its long-term development plan – became the official “ideology”.

<sup>121</sup> For example, the NDP calls for a greater mix of energy sources and a greater diversity of IPPs in the energy industry, but also includes nuclear power <<http://www.bdlive.co.za/opinion/2016/07/28/is-eskom-building-a-case-for-nuclear-power>> (accessed 29-07-2016).

<sup>122</sup> In 2001, the Policy, Coordination and Advisory Services Unit (PCAS) was established to coordinate policy formulation and monitoring and evaluation of policy implementation. It was however disbanded in 2009. The

only determinedly addresses the economy's vulnerabilities, and makes it competitive, by diversifying and identifying new niche manufacturing products, but directly coordinates industrial investment, actively directs macro-economic policy towards developmental goals and protects and promotes the national interest.<sup>123</sup> It facilitates the setting of national goals, makes use of the market and monitors whether policies are implemented and are having the desired effect. Yet the biggest failure of many of the South African government's economic reforms lies in minimal coordination of disparate economic reforms due to a proliferation of economic policies and various government departments responsible for economic policy implementation.<sup>124</sup>

In conclusion, whereas developmental states in East Asia were authoritarian; in the South African context and framework of a transformative constitution, the developmental state has to be democratic. Whilst this is different to Johnson's conceptualisation of the developmental state as a soft authoritarian state, it is closer to Evan's broader definition of "state embeddedness". As Gumede also suggests, because South Africa is a

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National Planning Commission was established in 2009, to support Cabinet in long-term planning and coordination. The members of the new National Planning Commission (NPC) were announced on 30 April 2010. The commission was chaired by the then Minister in the Presidency: National Planning Commission Trevor Manuel, with ANC heavyweight and business leader Cyril Ramaphosa as his deputy. Also on the team were ANC national executive committee member Joel Netshitenzhe and Business Unity South Africa chief executive officer Jerry Vilakazi. The 24 people on the team had expertise in areas including finance, industry, telecommunications, biotechnology, energy, education, food security and climate change. See "Ramaphosa, Godsell on National Planning Commission" *Mail & Guardian* (30 April 2010). An NPC Secretariat is located in the Presidency, staffed with officials and working alongside the Department of Monitoring and Evaluation (DPME). In September 2015 the President appointed a new cohort of National Planning Commissioners to support the ongoing implementation of the NDP and its translation into government policy. See <<http://www.thepresidency.gov.za/pebble.asp?relid=20602>> (accessed 29-07-2016) for the mandate of the new commission, which primarily pertains to the long-term development of the country.

<sup>123</sup> See National Assembly statement on Industrial Policy Action Plan (IPAP2) by Dr Rob Davies, Minister of Trade and Industry, 18 February 2010, <http://www.info.gov.za/view/DownloadFileAction?id=117330> (accessed 23-07-2016). The 2010/11 to 2012/13 Industrial Policy Action Plan (IPAP) IPAP2, as it has become known, builds on the National Industrial Policy Framework (NIPF) and the 2007/08 IPAP. It represents a scaling up of the government's efforts to promote long-term industrialisation and industrial diversification beyond the reliance on traditional commodities and non-tradable services. Its purpose is to expand production in value-added sectors with high employment and growth multipliers that compete in export markets as well as compete in the domestic market against imports. In so doing, the action plan also places emphasis on more labour absorbing production and services sectors, the increased participation of historically disadvantaged people and regions in the economy and seeks to facilitate, in the medium term, South Africa's contribution to industrial development in the African region.

<sup>124</sup> Departments of Labour, Economic Development, Small Business Development, Trade and Industry, Public Enterprises, Agriculture, Forestry and Fisheries, Mineral Resources, Energy, Science and Technology, Rural Development and Land Reform, Tourism, National Treasury. See <<http://www.gov.za/about-government/government-system/national-departments>> (accessed 29-07-2016).

constitutional democracy that provides for both representative and participatory democracy, “ordinary citizens will not only have to be consulted but also to be involved and participate in the decisions, whether economic, political or social, that affect them.” This means that the South African state “must deliver development in both the economic and democratic spheres.”<sup>125</sup>

South Africa’s prospects of overcoming its legacy of poverty and inequality and to offer a way ahead for a transformed society rests on a vision of a democratic developmental state. This vision has now been broadly defined in the National Development Plan and its implications have begun to be implemented. There is a need to start focusing on how effective interventions can further socio-economic transformation in South Africa, to bring a range of important ideas to a wider public and to allow interaction between citizens, the state and autonomous institutions that will place a broader vision of a democratic developmental state on the agenda. This dissertation contributes to developing the concrete implications of the democratic, developmental state in two key areas of human rights law – socio-economic rights and administrative justice, and examines in particular the role of the judiciary in facilitating that promise, underpinned by a transformative constitution.

The analysis has pointed to a number of conclusions. The first is that the developmentalist ideology of the South African state has been tempered by the globalisation imperatives, which, among others, give primacy to the needs of the market. Poverty has decreased somewhat over the past 22 years but remains widespread and deeply entrenched. At the same time inequality has expanded to global heights. Further, whilst the government continues to stress the relevance of the people in its policy, in actual practice citizens and people are frequently passive clients, users and customers.

With respect to the structural features of the state, South Africa began to establish institutional features of a democratic developmental state. Among the notable features the South African developmental state was the establishment of collaborative, centralised

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<sup>125</sup> Gumede *Delivering the democratic developmental state*.

leadership with a clear vision and political will to promote a process of accumulation whose fruits would be shared by all. For this purpose, the National Planning Commission faced the momentous task of developing a long-term national vision and plan for socio-economic transformation.<sup>126</sup> The challenge remains the inclusion of the non-elites, the ordinary people, in the preparation and implementation of a democratic developmental state, and towards socio-economic transformation. At the same time the ongoing rampant corruption, lack of effective political leadership and inefficiencies of the state will continue to hamper many democratic and developmental outcomes, unless broader society and democratic institutions, such as the judiciary, are truly able to assert accountability.

The National Development Plan 2030 ('NDP') states:

"The National Development Plan aims to eliminate poverty and reduce inequality by 2030. South Africa can realise these goals by drawing on the energies of its people, growing an inclusive economy, building capabilities, enhancing the capacity of the state, and promoting leadership and partnerships throughout society."<sup>127</sup>

Notions of participation, capabilities, autonomy and empowerment of poor and marginalised communities are central to considering the interaction between socio-economic rights and administrative justice in addressing poverty. By developing the interlinkages between administrative justice and socio-economic rights, this vision of a democratic developmental state and effective socio-economic transformation can be supported, both in terms of substance and process. The next section will examine in more

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<sup>126</sup> In his State of the Nation Address 2009, President Zuma made an undertaking that government would implement BBBEE and affirmative action policies in recognition of the need to correct the imbalances of the past. In December 2009, President Zuma announced the names of those who would serve in the Broad-Based Black Economic Empowerment (BBBEE) Council, in terms of the BBBEE Council Act 53 of 2003. The functions of the council, which is chaired by the President, are to advise government on black economic empowerment, review progress in achieving black economic empowerment, provide advice on draft codes of good practice and advise on draft transformation charters if required. They are also required to facilitate partnerships between organs of state and the private sector that will advance the objectives of the BBBEE Act. "Zuma Appoints BBBEE Council" (4 December 2009) <<http://www.southafrica.info/news/business/648737.htm>> (accessed 29-07-2016).

<sup>127</sup> National Planning Commission *NDP Executive Summary* (2012) 14 <<http://www.gov.za/issues/national-development-plan-2030>> (accessed 29-06-2017).



depth the concepts of participatory democracy, autonomy and Sen's capability approach. As highlighted by Evans, these should lie at the heart of a democratic developmental state seeking to transform deep-seated poverty and inequality. An understanding of these concepts will assist in the analysis of the jurisprudence on socio-economic rights and administrative justice in the chapters that follow.

## 2.4 Participatory democracy

Sen argues that the attainment of social justice, without public reasoning based on participatory and deliberative democratic models, is not possible.<sup>128</sup> These two contemporary models of democracy, closely allied with direct democracy, will be discussed in this section. I will then examine how democracy in the South African Constitution can be characterised as representative, participatory and direct,<sup>129</sup> with an emphasis on exploring the participatory provisions that must support the transformation project in a democratic developmental state, namely: public participation in legislative processes,<sup>130</sup> in the public administration,<sup>131</sup> just administrative action,<sup>132</sup> and socio-economic rights.<sup>133</sup> I argue that the vision of participatory democracy laid down in our Constitution is necessary in order for a democratic developmental state to facilitate the transformation of South African society, as outlined above, into one "based on democratic values, social justice and fundamental human rights". A democratic developmental state requires vigorous discussion, debate and activism in the process of transformation and

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<sup>128</sup> Sen *The Idea of Justice*.

<sup>129</sup> For a discussion of the conceptions of democracy in the South African Constitution, see I Currie & J De Waal *The Bill of Rights Handbook* 6 ed (2013) 15; and T Roux "Democracy" in S Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (2008) 15. See also G Quinot "Snapshot or participatory democracy? Political engagement as fundamental human right" (2009) 25 *SAJHR* 392, 397-399 on participatory democracy; and Liebenberg *Socio-Economic Rights* 28-34 on deliberative democracy.

<sup>130</sup> Sections 57, 59, 70, 72, 74, 116, 118, 160.

<sup>131</sup> Section 195(1)(e).

<sup>132</sup> Section 33. See chapter five.

<sup>133</sup> Sections 25-29. The Constitutional Court has interpreted particular socio-economic rights to include participatory elements, most notably in eviction cases where 'meaningful engagement' with affected parties have been read into s26. See *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC) paras 39, 42; *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (5) BCLR 475 (CC) paras 9-18; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 (9) BCLR 847 (CC) paras 167, 237-44; *Abahlali Basemjondolo Movement SA v Premier, KwaZulu-Natal* 2010 (2) BCLR 99 (CC) paras 113-14. See detailed discussion of these and more recent education-related cases in chapter four.



responsiveness “to the inequalities and material deprivation that prevent certain groups from participating as equals in the creation of a new society”.<sup>134</sup>

## 2.4.1 Participatory democracy in theory

In *The Idea of Justice*, Sen states that the institutional structure of the contemporary practice of democracy hails largely from the experience of Europe and America over the last few centuries.<sup>135</sup> He regards this as a remarkable achievement as these institutional forms have been effective. However, he is at pains to point out that while democracy in its current institutionally elaborate form may be quite new and Western-centred, participatory governance in practice has a much wider and longer history in the world.<sup>136</sup> Early expressions of democracy can be found scattered around the globe from Greece, to Ancient India, to Japan. He states that in fact the practice of elections has a long history in non-Western societies, as does “the broader view of democracy in terms of public reasoning that makes it abundantly clear that the cultural critique of democracy as a purely regional phenomenon fails altogether”.<sup>137</sup>

He goes on to give the example of Nelson Mandela’s autobiography, *Long Walk to Freedom*, where Mandela describes how impressed and influenced he was, as a young boy, by the democratic nature of the proceedings of the local meetings that were held in the regent’s house in Mqhekezweni:

“Everyone who wanted to speak did so. It was democracy in its purest form. There may have been a hierarchy of importance among the speakers, but everyone was heard, chief and subject, warrior and medicine man, shopkeeper and farmer, landowner and labourer... The foundation of self-government was that all men [sic] were free to voice their opinions and equal in their value as citizens.”<sup>138</sup>

<sup>134</sup> Liebenberg *Socio-Economic Rights* 34.

<sup>135</sup> Sen *The Idea of Justice* 322-354. On the institutional history of democracy, see also generally J Dunn *Democracy: A History* (2005), quoted in Sen.

<sup>136</sup> Sen *The Idea of Justice* 323.

<sup>137</sup> Sen *The Idea of Justice* 330-332.

<sup>138</sup> N Mandela *Long Walk to Freedom* (1994) 21, quoted in Sen *The Idea of Justice*.

As Sen highlights, Mandela's understanding of democracy was not rooted in the political practice that he saw around him during the reign of apartheid based on a European system, but on his general ideas about political and social equality, which had global roots, and from his observations of the practice of participatory public discussion that he found in his local town.<sup>139</sup>

This recognition, argues Sen, points to a connection between the idea of justice and the practice of democracy. In contemporary political philosophy the view that democracy is best seen as "government by discussion" has gained widespread support.<sup>140</sup> This contemporary view of democracy has broadened considerably, so that democracy is no longer seen only in terms of public balloting, but in terms of what John Rawls calls the "exercise of public reason".<sup>141</sup> As Rawls explains in *Theory of Justice*, the conception of deliberative democracy is founded on the importance of deliberation amongst citizens, when they exchange viewpoints and debate their positions concerning public political issues.<sup>142</sup>

Nancy Fraser introduced the concept of "participatory parity" which advances the notion that "justice requires social arrangements that permit all (adult) members of society to interact with one another as peers."<sup>143</sup> For "participatory parity" to exist, "it is necessary but not sufficient to establish standard forms of formal legal equality."<sup>144</sup> She highlights two additional conditions that must be satisfied: the first requires that material resources be distributed across society in such a way as to ensure participants' independent "voice";

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<sup>139</sup> Sen *The Idea of Justice* 332.

<sup>140</sup> Sen *The Idea of Justice* 324.

<sup>141</sup> Sen *The Idea of Justice*. See J Rawls, *A Theory of Justice* (1971), and *Political Liberalism* (1993).

<sup>142</sup> J Rawls *Collected Papers* (1999) 579-80. See also proponents of deliberative democracy referred to in Sen *The Idea of Justice* 324-326, in particular J Habermas "Three Normative Models of Democracy" in S Benhabib (ed) *Democracy and Difference: Contesting the Boundaries of the Political* (1996) 21-30. See further the discussion in Liebenberg Socio-Economic Rights 28-34 on deliberative democracy, and sources referred to in note 29 generally: J Habermas *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (trans W Rehg) (1996); A Gutmann & D Thompson *Democracy and Disagreement* (1996); S Benhabib "Toward a deliberative model of democratic legitimacy" in S Benhabib *Democracy and Difference: Contesting the Boundaries of the Political* (1996); I M Young *Inclusion and Democracy* (2000) 16-51; D Davis *Democracy and Deliberation* (1999).

<sup>143</sup> Fraser "Social justice in the age of identity politics" in *Redistribution or Recognition?* 30-31.

<sup>144</sup> Fraser "Social justice in the age of identity politics" in *Redistribution or Recognition?* 30-31.

the second requires that equal respect is expressed for all participants and there is equal opportunity for all to achieve social esteem.<sup>145</sup>

While there are differences amongst contemporary democracy theorists about the role of public reasoning in politics, these debates are not critical to this dissertation. What is important to note for the purposes of this dissertation, is that these contributions have elevated the central issues of political participation, dialogue and public interaction within a broader understanding of democracy. Sen argues that the vital role of public reasoning in the practice of democracy makes the entire subject of democracy relate closely with notions of justice. He thus reasons that since the “demands of justice” must be assessed with the help of public reasoning, and public reasoning is constitutively related to the idea of democracy, there is a direct connection between justice and democracy.<sup>146</sup> The value of this broadened form of democracy, he explains, is firstly the ability to make people take an interest, through public discussion, in each other’s predicaments, and to have a better understanding of the lives of others. The second concerns the informational role of democracy which goes beyond its incentive functions, to improved policy-making.<sup>147</sup>

His argument, based on global evidence, is that democracy and political and civil rights tend to enhance freedoms of other kinds (such as human security) through giving a voice to the marginalised and vulnerable on important policy issues, and thereby influencing greatly their developmental outcomes.<sup>148</sup> He provides examples of areas where social change has been brought about as a result of a “determined use of political and social voice”, such as the feminist revolution and achievement of gender equality in certain instances. More recently, this has been witnessed in South Africa in the service delivery protests by people directly affected,<sup>149</sup> the student protests for free, quality, decolonised

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<sup>145</sup> Fraser “Social justice in the age of identity politics” in *Redistribution or Recognition?* 30-31.

<sup>146</sup> Sen *The Idea of Justice* 324.

<sup>147</sup> Sen *The Idea of Justice* 324.

<sup>148</sup> Sen *The Idea of Justice* 348.

<sup>149</sup> See J Dugard “Urban Basic Services” in *Socio-economic Rights in South Africa: Symbols or Substance* (2015) 275-309, 286-291, and R Pithouse “The University of Abahlali baseMjondolo’ (2007) <<http://abahlali.org/node/2814/>> (accessed 17-05-2016) who critique the terminology of “service delivery”

higher education and the learner protests against discriminatory policies and practices at schools across the country.<sup>150</sup> This mounting action in organised movements is based broadly on demands for human rights, such as the right to education (including tertiary education, quality education, non-discriminatory education), housing and basic services, food, basic healthcare, guarantees of environmental preservation and the right to employment. Sen says that these movements raise awareness of particular societal failures, in addition to public debates in the media, by providing “a politically harder edge to socially important demands”.<sup>151</sup>

Democratic freedom can thus lead to more effective and equitable policies and social justice. A democratic developmental state, in order to achieve socio-economic transformation and reduce poverty and inequality, requires engagement and activism both by those affected by injustice, poverty and marginalisation, as well as those who contribute intellectually to the transformation of society, such as the legal fraternity, academics, technocrats and the media.<sup>152</sup>

This leads us finally to a discussion of participatory democracy,<sup>153</sup> as distinguished from deliberative democracy. Theunis Roux distinguishes between deliberative democracy and participatory democracy, although they are both closely aligned to the model of direct democracy. He explains that deliberative democracy and participatory democracy are “superficially similar” since both are seen in the context of a response against democracy producing passive citizens who only participate in periodic elections. He goes on to explain the difference between these two forms of democracy. For theorists, deliberative democracy encompasses a particular form of participation – deliberation – that may nevertheless legitimate collective decisions even where fundamental disagreement exists.

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protests and point to the fact that many of these protests are about inadequate service delivery and also about a lack of effective voice and participation in the delivery of services.

<sup>150</sup> See R Munusamy “Countdown to Disaster” *Daily Maverick* (2016-10-21) and numerous other media articles on the recent #FeesMustFall protests and their impact on policy on the funding of higher education.

<sup>151</sup> Sen *The Idea of Justice* 348.

<sup>152</sup> Sen *The Idea of Justice* 351.

<sup>153</sup> See Roux “Democracy” in *Constitutional Law of SA* 14-15 and Quinot (2009) 25 *SAJHR* 397-399. For a more detailed examination of participatory democracy, see C Pateman *Participation and Democratic Theory* (1970) 22-44; Held *Models of Democracy* 3 ed (2006) 209-16; Cunningham *Theories of Democracy* (2002) 123-41.

Participatory democracy in contrast, assumes that sufficient and meaningful participation will eventually result in agreement between citizens on the “right” decision in the public interest.<sup>154</sup>

Carole Pateman, the chief exponent of the theory of participatory democracy, explains that national, representative institutions are not sufficient for democracy. In order to maximise the participation of people, “social training’ for democracy” must take place in other domains. She argues that the process of participation in itself supports the development of psychological qualities and individual dispositions. The major function of participation in participatory democracy is thus an educative one: through psychological growth and enhancement of democratic tools and skills.<sup>155</sup>

David Held describes participatory democracy as part of the same model as direct democracy, since they both stress the value of citizen participation in the making of collective decisions.<sup>156</sup> In contemporary terms, Roux explains participatory democracy as “an attempt to re-inject elements of direct democracy into modern systems of representative democracy.”<sup>157</sup> Participatory democracy is thus, in this sense, fundamentally about whether and how, citizens should be given the right to participate in the making of decisions that affect them, despite the fact that the modern nation-state embraces representative democracy as the mechanism by which citizens have their say.<sup>158</sup>

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<sup>154</sup> Roux “Democracy” in *Constitutional Law of SA* 15–18.

<sup>155</sup> Pateman *Participation and Democratic Theory* 42. According to CB Macpherson, the “circular” problem with the approach of participatory democracy is that the two “virtues” of participation, that of promoting a more active citizenry and reducing poverty and inequality, “are also its prerequisites”. See CB Macpherson *The Life and Times of Liberal Democracy* (1977) 99-100, quoted in Roux “Democracy” in *Constitutional Law of SA* 15. In relation to the well-known “circularity problem” of justice as democratic participation also see Liebenberg *Socio-Economic Rights* 32 and sources cited by her in notes 40, 41 and 42: N Fraser “Social justice in the age of identity politics: Redistribution, recognition and participation” in N Fraser & A Honneth *Redistribution or Recognition? A Political-Philosophical Exchange* (2003) 7-109, 44; J Cohen ‘The economic basis of deliberative democracy’ (1989) 6 *Soc Philos Policy* 25-50; J Cohen ‘Procedure and substance in deliberative democracy’ in S Benhabib (ed) *Democracy and Difference: Contesting the Boundaries of the Political* (1996) 95-119; S Benhabib ‘Toward a deliberative model of democratic legitimacy’ in S Benhabib *Democracy and Difference: Contesting the Boundaries of the Political* (1996) 78-79; T Roux ‘Democracy’ in S Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (Original Service, September 2006) chapter 10, 18.

<sup>156</sup> Held *Models of Democracy* 6, 210; Pateman *Participation and Democratic Theory* 42; Quinot (2009) 25 *SAJHR* 397.

<sup>157</sup> Roux “Democracy” in *Constitutional Law of SA* 14.

<sup>158</sup> Roux “Democracy” in *Constitutional Law of SA* 14.

Held notes that proponents of participatory democratic models also emphasise the critical importance of transforming politics and democratising the institutions of the state by making parliament, state bureaucracies and political parties more open and accountable.<sup>159</sup> The South African Constitution affords precisely this type of democracy in various provisions discussed in the next section. These democratic aspects of the South African Constitution are what makes it transformative, as discussed above, and in turn must necessarily underpin the democratic developmental state and how it engages with and includes citizens in decision-making through its capable, open and accountable institutions.

#### 2.4.2 Participatory democracy in the South African Constitution

The South African Constitution is said to recognise three forms of democracy: representative democracy, participatory democracy and direct democracy.<sup>160</sup> At the heart of South Africa's transformative Constitution lies a participatory democratic culture that is integral to the achievement of social justice and development for all. This is immanent both in the legal text of the Constitution and the judgments of the Constitutional Court over the past 22 years,<sup>161</sup> as well as in the culture of social, economic and political activism and debate that has grown and thrived since the advent of democracy in South Africa.

Public debate and activism around issues of poverty, inequality and development in South Africa spans the work of research organisations, trade unions, civil society organisations, the media, and academia; and is even more vividly seen in the service delivery protests of poor communities and demonstrations of mass movements. All of this exchange has contributed to an ongoing policy debate in the country concerning

<sup>159</sup> Held *Models of Democracy* 211, quoted in Quinot (2009) 25 SAJHR 397.

<sup>160</sup> Currie & De Waal *Bill of Rights Handbook* 14-17.

<sup>161</sup> See sections 1(d), 57, 59, 70, 72, 74, 116, 118, 160, 195(1)(e). Cases addressing participatory democracy that have come before the courts include: *Doctors for Life International v The Speaker of the National Assembly* 2006 (12) BCLR 1399 (CC) para 108, 112-117, 121, 234; *Poverty Alleviation Network v President of the Republic of South Africa* 2010 (6) BCLR 520 (CC) paras 33, 40; *New Clicks South Africa (Pty) Ltd v Tshabalala-Msimang & Another* NNO 2005 (2) SA 530 (C) para 627; *Masetlha v President of the Republic of South Africa* 2008 (1) BCLR 1 para 181; *Land Access Movement of South Africa v Chairperson of the National Council of Provinces* 2016 (10) BCLR 1277 (CC) para 58.

government's macro-economic and distributional policies and serves to augment a democratic developmental state.<sup>162</sup> As Sandra Liebenberg writes:

“Active debate and contestation concerning the nature of social change, and the political and legal reforms necessary for achieving it, should not be viewed as antithetical to transformation, but rather as integral to its achievement.”<sup>163</sup>

The late former Chief Justice Langa elaborated a view of constitutional transformation as a process of constant dialogue and contestation in the pursuit of a more just society as follows:

“[T]ransformation is not a temporary phenomenon that ends when we all have equal access to resources and basic services and when lawyers and judges embrace a culture of justification. Transformation is a permanent ideal, a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created, accepted and rejected and in which change is unpredictable but the idea of change is constant. This is perhaps the ultimate vision of a transformative, rather than a transitional Constitution. This is the perspective that sees the Constitution as not transformative because of its peculiar historical position or its particular socio-economic goals but because it envisions a society that will always be open to change and contestation, a society that will always be defined by transformation.”<sup>164</sup>

This is the notion of deliberative democracy, as a particular form of participatory democracy, discussed by Sen above, that will aid in the transformation of the current status quo and achievement of a more just society. Both deliberative and participatory democracy are necessary in a democratic developmental state. Deliberative democracy can contribute to making participatory democracy more meaningful, where all actors/participants are open to changing their views and there are no fixed or pre-conceived policy positions.

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<sup>162</sup> See section above on the conception of the South African democratic developmental state.

<sup>163</sup> Liebenberg *Socio-Economic Rights* 29.

<sup>164</sup> Langa (2006) 17(3) *Stell LR* 354.



Besides the value of general discussion and debate in the public arena, public participation in the processes of government is also an integral part of our constitutional democracy. One of the founding constitutional values is a multi-party system of democratic government based on accountability, responsiveness and openness.<sup>165</sup> The Constitution expressly provides for public access to and participation in legislative processes,<sup>166</sup> as well as the executive processes by providing that among the “basic values and principles governing public administration” is that “people’s needs must be responded to, and the public must be encouraged to participate in policy-making”.<sup>167</sup>

The Constitutional Court has in several cases also underscored the centrality of participatory democracy to the achievement of constitutional goals and values,<sup>168</sup> the necessity of this participation for purposes of informed decision-making<sup>169</sup> and acknowledged the duty of the State to take positive measures to ensure that the public has the effective capacity and opportunity to participate in decision-making processes.<sup>170</sup> In particular, it has highlighted the need to listen to the voices of the poor and marginalised in society.<sup>171</sup> The Court has affirmed that the participation of the poor in the determination of their access to benefits and services, endorses the values of dignity and

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<sup>165</sup> Section 1(d).

<sup>166</sup> Sections 57, 59, 70, 72, 74, 116, 118, 160. See *Land Access Movement of South Africa v Chairperson of the National Council of Provinces* 2016 (10) BCLR 1277 (CC) where the applicants sought a declaration that the Restitution of Land Rights Amendment Act 15 Of 2014 was invalid for failure by the National Council of Provinces (NCOP) and the Provincial Legislatures to facilitate adequate public participation as required by sections 72(1)(a) and 118(1)(a) of the Constitution.

<sup>167</sup> Section 195(1)(e). Sections 50 and 51 of the Local Government: Municipal Systems Act 32 of 2000 (‘Municipal Systems Act’) affirm the application of the constitutional principles governing public administration to the provision of municipal services.

<sup>168</sup> In *Masetlha v President of the Republic of South Africa* 2008 (1) BCLR 1 para 181, the Constitutional Court elaborated upon the goals and values of the Constitution in relation to democracy and participation:

“[I]t is apparent from the Constitution that the democratic government that is contemplated is a participatory democracy which is accountable, transparent and requires participation in decision-making.”

See also *Doctors for Life International v The Speaker of the National Assembly* 2006 (12) BCLR 1399 (CC) para 121; and *Poverty Alleviation Network v President of the Republic of South Africa* 2010 (6) BCLR 520 (CC) para 40.

<sup>169</sup> Para 33.

<sup>170</sup> See *Doctors for Life International v The Speaker of the National Assembly* 2006 (12) BCLR 1399 (CC) para 108, 112–117.

<sup>171</sup> Para 115, where the Constitutional Court highlighted the importance and value of participation by marginalised groups in legislative processes in order to give legitimacy to legislation and dignity to those who participate. See also the discussion of “meaningful engagement” in the eviction and education cases in chapter four.



freedom as well as gives substance to the deliberative and participatory democracy envisaged in the Constitution.<sup>172</sup> Liebenberg argues that a lack of opportunity for people to air their concerns about decisions that affect their lives can be a major source of disempowerment and lack of autonomy. She asserts that “meaningful participation” in such decisions is at the heart of the relationship between freedom and human dignity because it provides a sense of control over one’s life and nourishes a sense of self-worth as equal members of society. Individual participation in decision-making thus underpins participatory and deliberative democracy and the values of accountability, responsiveness and openness in the Constitution.<sup>173</sup>

The Constitutional Court has repeatedly affirmed that deliberative and participatory democracy seek to enhance and deepen representative democracy and the values of freedom and dignity, by expanding the opportunities for people’s active participation in decision-making processes, including in relation to cases dealing with their access to socio-economic rights. It is about more than mere participation in a representative democracy through regular elections and the institutional platforms provided for citizens to offer input,<sup>174</sup> but also going beyond to creating numerous fora for dialogue and mechanisms for participation. The aim is to promote greater participation in the public and private institutions that affect diverse aspects of people’s lives.<sup>175</sup> Those particularly disadvantaged groups who are not easily able to participate in deliberative processes as

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<sup>172</sup> See *Doctors for Life International v The Speaker of the National Assembly* 2006 (12) BCLR 1399 (CC) para 115, 234 and *New Clicks South Africa (Pty) Ltd v Tshabalala-Msimang & Another NNO* 2005 (2) SA 530 (C) para 627 where Sachs J writes of the importance of dialogue and having a voice in public affairs, to the right to dignity. In *Doctors for Life International v The Speaker of the National Assembly* 2006 (12) BCLR 1399 (CC) para 234, and quoted again in *Land Access Movement of South Africa v Chairperson of the National Council of Provinces* 2016 (10) BCLR 1277 (CC) para 58, Sachs J stated that “[p]ublic involvement . . . [is] of particular significance for members of groups that have been the victims of processes of historical silencing”. He added:

“It is constitutive of their dignity as citizens today that they not only have a chance to speak, but also enjoy the assurance they will be listened to. This would be of special relevance for those who may feel politically disadvantaged at present because they lack higher education, access to resources and strong political connections. Public involvement accordingly strengthens rather than undermines formal democracy, by responding to and negating some of its functional deficits.”

<sup>173</sup> Liebenberg (2008) *Acta Juridica* 167-168.

<sup>174</sup> Liebenberg *Socio-Economic Rights* 30.

<sup>175</sup> Liebenberg *Socio-Economic Rights*.

peers or political equals, must be given real and “meaningful” opportunities for participation.<sup>176</sup>

In order for socio-economic transformation to have a real impact on the lives of the poor and marginalised, their meaningful participation in the development of law and policy as well as administrative decision-making, is required. As Sen posits above, democratic rights are the “constituent components” of development. Evans argues that strategies and policies for development should not be formulated by technocrats alone, but must include “democratically organised public deliberation”.<sup>177</sup> Gumede and others also argue that in a South African democratic developmental state, opportunities for informed participation can lead to transparent, accountable dialogue and debate grounded in reality, on key policy choices to address the impact of poverty and inequality. This resonates with a constitutional democracy that requires decisions to be considered in the light of certain fundamental norms and values.

The adjudication of human rights norms in the courts is also a significant opportunity for deliberation on the interpretation of the substantive content of rights from the perspective of the adjudicators and experts as well as from the perspective of those whose rights are affected, as required in a participatory democracy.<sup>178</sup> In this section I have argued that the combination of opportunities for participatory democracy to thrive in policy and law-making, administrative decision-making and adjudication of rights, are critical elements of a democratic developmental state’s response to conditions of poverty and inequality in South Africa, and move us closer to the constitutional ideal of social justice.

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<sup>176</sup> Liebenberg *Socio-Economic Rights* 32.

<sup>177</sup> Evans “Constructing the 21<sup>st</sup> Century Developmental State” in *Constructing a Democratic Developmental State in SA* 43.

<sup>178</sup> Evans “Constructing the 21<sup>st</sup> Century Developmental State” in *Constructing a Democratic Developmental State in SA* 33. Liebenberg cautions that there is nevertheless a tension between the Courts as being supportive of deliberative and participatory democracy, at the same time as being “a forum for authoritative decision-making according to binding legal norms”.

## 2 5 Conclusion

This chapter serves as the theoretical background to the analysis of socio-economic rights and administrative justice jurisprudence in chapters four, five and six. I described the concept of transformative constitutionalism that frames a South African democratic developmental state. The South African Constitution is the legal framework for the socio-economic transformation of South African society from its unequal and unjust past. It lays the foundation for participatory and deliberative processes and institutions to imagine and conceive what is required to transform this society. These processes and fora, in a democratic developmental South African state, must be sufficiently inclusive of a diversity of voices. They must enable all groups, including those affected by poverty and marginalisation, to participate meaningfully as equals to remedy various manifestations of widespread socio-economic deprivation and disempowerment in South Africa.

The evolution of the developmental state in South Africa was a move away from the welfare state to a more development-oriented and empowered approach, as articulated in the long-term vision for South Africa, the National Development Plan 2030. The South African version is envisaged as a *democratic developmental* state, emphasising the critical importance of participatory democracy and autonomous, accountable and capable institutions supporting the transformation project. It seeks to address the situation of poverty in South Africa in a way that recognises that overcoming the oppression of poverty is not just a matter of distributing material benefits to the poor but also incorporating their views in the decisions that affect their lives.

The next chapter explores the international and South African multi-dimensional conceptualisation of poverty, which incorporates material and empowerment elements. I then describe the situation of poverty in South Africa in these various paradigms. Finally, I link a development economics understanding of poverty to an integrated, multi-dimensional human rights approach to poverty, that acknowledges the significant intersection of socio-economic and participatory rights.

## CHAPTER 3: Conceptualising poverty for a democratic developmental state

### 3.1 Introduction

The next sections examine the different conceptions of poverty, some of which include dimensions of disempowerment and inequality, and a human rights-based approach to poverty. The definition and measurement of poverty, the world over, remains contested terrain. Its dimensions include factors such as income, access to basic services, assets, human capital, political freedoms and social capital. This broad approach to poverty allows for engagement with the reality of poverty and the combination of interventions required to address it.

The multidimensional view of poverty articulates that the lives of the poor are characterised by deprivation and a lack of entitlements to food, health, education, security provisions, agency, political influence and so on. The term “poverty” therefore encompasses a wide range of issues that cover the spectrum of both socio-economic and civil and political rights. The human rights approach to poverty framework reflects the fundamental interdependence of economic, social and cultural rights, and civil and political rights.<sup>179</sup>

The most current and prominent development economics perspectives of poverty, include the income-based perspective, basic needs, sustainable livelihoods, capability, social exclusion and subjective well-being – some of which are multi-dimensional and include aspects of “agency”, “autonomy” and inequality, and some of which are more narrowly construed. Several of these are also applied in the development literature in

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<sup>179</sup> Office of the United Nations High Commissioner for Human Rights (OHCHR) *Human Rights and Poverty Reduction: A Conceptual Framework* (2004) 10-12; and B A Andreassen “The human rights and development nexus: From rights talk to rights practices” in D Banik (ed) *Poverty, Politics and Development: Interdisciplinary Perspectives* (2006) 298.

South Africa but are not suitable in the context of a South African democratic developmental state.

This chapter then provides a contextual description of the situation of poverty still requiring widespread redress in South Africa. The extent of and trends in poverty and inequality over the past twenty-two years of constitutional democracy are presented for the purposes of understanding the multitude of challenges and monitoring the impact of policies, laws and jurisprudence on poverty. The ability to measure the efficacy of poverty reduction measures implemented by government and the impact of court cases on poverty reduction is critical for tracking the progress of socio-economic transformation itself and assessing the effectiveness of the institutions in support thereof.

The purpose of this chapter is to define poverty for the South African democratic developmental state, and apply this conception to the analysis of the jurisprudence on socio-economic rights and administrative justice in chapters four, five and six. A democratic developmental state is best served by a multi-dimensional approach to poverty most closely aligned to Sen's capability perspective, which acknowledges both material needs as well as the important role of human agency and freedom in development and links to an integrated human rights approach to poverty.

### **3.2 Global conceptions of poverty**

Sixteen years ago, global leaders at the World Summit for Social Development described poverty eradication as an ethical, political and economic imperative.<sup>180</sup> Since then, poverty eradication has become the overarching objective of development, as reflected in the internationally agreed Millennium Development Goals ('MDG's), which set the target

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<sup>180</sup> In September 2000, world leaders came together at the UN Millennium Summit and 189 nations adopted the *United Nations Millennium Declaration*. The Declaration was signed by 147 heads of state and governments, who committed their countries to a new global partnership to reduce extreme poverty and setting out a series of time-bound targets to be achieved by 2015. These have become known as the Millennium Development Goals. See United Nations "United Nations Millennium Declaration" Resolution adopted by the General Assembly on 18 September 2000 *United Nations* <<http://www.un.org/millennium/declaration/ares552e.htm>> (accessed 26-07-2016).

of halving global extreme poverty by 2015,<sup>181</sup> and the newly agreed upon Sustainable Development Goals ('SDG's').<sup>182</sup> On September 25th 2015, a United Nations-led initiative "Transforming our world: the 2030 Agenda for Sustainable Development", saw countries adopt another set of global goals to end poverty, protect the planet, and ensure prosperity for all. The SDGs are an intergovernmental set of 17 ambitious goals with 169 targets to be achieved over the next 15 years, including: "ending poverty in all its forms and dimensions, including by eradicating extreme poverty by 2030"; and "reducing inequalities within and among countries". They help to define and guide the international, regional and national policy agendas for poverty eradication and sustainable development until 2030. The goals include numerous poverty-related issues and define poverty as encompassing various dimensions.

Since the MDGs were agreed upon, it has been difficult to measure improvements in the overall poverty levels and success in achieving them erratic.<sup>183</sup> An understanding of where poverty exists and how poverty has changed over time, depends firstly on developing an adequate conceptualisation of poverty, and secondly on how it is then measured and monitored. In order to fully comprehend the nature and extent of poverty, as well as to develop and evaluate poverty reduction policies and programmes, there must be clarity on the definition and measurement of poverty.

Definitions of poverty range from those solely focused on income and expenditure, to those which look more broadly at basic needs such as health and education, and to those

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<sup>181</sup> The eight MDGs break down into 21 quantifiable targets, which are measured by 60 indicators that respond to the world's main development challenges. They are to: eradicate extreme poverty and hunger; achieve universal primary education; promote gender equality and empower women; reduce child mortality; improve maternal health; combat HIV/AIDS, malaria and other diseases; ensure environmental sustainability; and develop a Global Partnership for Development.

<sup>182</sup> United Nations "Transforming our world: the 2030 Agenda for Sustainable Development" (21-10-2015) *United Nations* <<http://www.un.org/sustainabledevelopment/sustainable-development-goals/>> (accessed 10-07-2016). The document states that the goals and targets are "integrated and indivisible" were developed over the course of two years of extensive public consultation and engagement with civil society and other stakeholders across the globe, including the poorest and most vulnerable community voices.

<sup>183</sup> United Nations "Rethinking Poverty: Report on the World Social Situation" (2010) *United Nations* <<http://www.un.org/esa/socdev/rwss/docs/2010/fullreport.pdf>> (accessed 26-07-2016).

which identify elements of social exclusion, inequality and disempowerment.<sup>184</sup> The five major perspectives on poverty are: income poverty,<sup>185</sup> capabilities,<sup>186</sup> basic needs,<sup>187</sup> social exclusion,<sup>188</sup> sustainable livelihoods,<sup>189</sup> and well-being.<sup>190</sup> These span broad and narrow and objective and subjective concepts, as well as quantitative and qualitative measures.<sup>191</sup> It is unnecessary to delve separately into these various perspectives for the purposes of this dissertation, but simply to highlight over-arching insights and principles for purposes of analysis of the South African jurisprudence in the context of a democratic developmental state. Julian May, in reviewing 24 studies of poverty in developing countries, speaks of an “elusive consensus” when it comes to definitions, measurement and analysis of poverty.<sup>192</sup> Poverty is a “contested political concept”<sup>193</sup> with an inextricable

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<sup>184</sup> The Presidency “Towards an Anti-poverty Strategy for South Africa: A Discussion Document” (2008) *The Presidency* 13 <[http://www.thepresidency.gov.za/docs/pcsa/economic/draft\\_antipoverty1008.pdf](http://www.thepresidency.gov.za/docs/pcsa/economic/draft_antipoverty1008.pdf)> (accessed 26-07-2016). The draft Strategy does not pin down a definition of poverty for the country *per se*, but broadly defines what it means based on the contemporary literature and research.

<sup>185</sup> See for example *World Bank* <<http://www.worldbank.org/en/topic/poverty/brief/global-poverty-line-faq>> (accessed 20-05-2016).

<sup>186</sup> See A Sen “Well-being, agency and freedom: the Dewey lectures 1984” *Journal of Philosophy* (1985) 82; and A Sen *Commodities and Capabilities* (1985), discussed further below.

<sup>187</sup> See P P Streeten *Basic needs: Premises and promises* (1979) *World Bank* <<http://documents.worldbank.org/curated/en/912301468190752919/pdf/REP62000Basic00remises0andOpromises.pdf>> (accessed 03-08-2016); I Davids “Poverty in South Africa: a development management perspective” in I Davids, F Theron, & K J Maphunye (eds) *Participatory Development in South Africa: A Development Management Perspective* (2005); and M Max-Neef *Human Scale Development: Conception, Application and Further Reflections* (1991).

<sup>188</sup> S Osmani *Evolving Views on Poverty: Concept, Assessment and Strategy* Poverty and Social Development Papers No.7 (2003) *Asian Development Bank* 6-9. See also various other commentators referred to by Osmani in footnote 8 for further literature on the concept of social exclusion and its relationship to poverty and inequality in particular. See also A Sen *Social Exclusion: Concept, Application, and Scrutiny* Social Development Papers No.1 (2000) *Asian Development Bank*, regarding the relationship between poverty and social exclusion. There is a huge body of literature on inequality as a major driver of poverty, that is beyond the scope of this discussion. See also S Liebenberg “Towards an Equality Promoting Interpretation of Socio-economic rights in South Africa: Insights from the Egalitarian Liberal Tradition” (2015) 132 *South African Law Journal* 411 – 437.

<sup>189</sup> See for example UK White Paper on International Development “Eliminating World Poverty: A Challenge for the 21st Century” (1997) *ODI* <<https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/2622.pdf>> (accessed 21-05-2016); Osmani *Evolving Views on Poverty* 15, 16.

<sup>190</sup> See L Camfield *Using Subjective Measures of Well-being in Developing Countries* (2003); and R Layard *Happiness: has social science a clue?* Lionel Robbins Memorial Lectures, delivered on 3, 4, 5 March 2003 at the London School of Economics, 9 <<http://cep.lse.ac.uk/events/lectures/layard/RL030303.pdf>> (accessed 12-09-2016).

<sup>191</sup> See May “An elusive consensus” in *Choices for the Poor*; Alcock *Understanding Poverty*; Townsend “Post-1945 poverty research” in *Researching Poverty*; and Aliber *Study of the Incidence and Nature of Chronic Poverty and Development Policy*.

<sup>192</sup> J May “An elusive consensus: Definitions, measurement and analysis of poverty” in A Grinspun (ed) *Choices for the Poor: Lessons from National Poverty Strategies* (2001).



link and relationship between how poverty is conceptualised, defined, explained, and the policies designed to address it.<sup>194</sup>

Broad perspectives of poverty include those that are multi-dimensional and based on an integrated and holistic view of poverty, whilst those narrowly construed mostly focus on income poverty alone. Objectively defined notions of poverty can be measured by collecting quantifiable data, such as income, literacy levels, calorie intake etc. Subjective concepts encompass a view of poverty that takes into consideration people's experiences along a multiplicity of dimensions.<sup>195</sup>

Although poverty lines that measure household income and consumption remain important, if not dominant, a more holistic approach has evolved that incorporates a range of well-being indicators, inequality indices, assessments of vulnerability and risk as well as the dynamics of change over time.<sup>196</sup> In addition, they introduce the notion of human rights. According to the statement adopted by the Committee on Economic, Cultural and Social Rights ('CESCR') of the United Nations in 2001, poverty is defined as encompassing a wide range of features:

“A human condition characterised by the sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an

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<sup>193</sup> See P Alcock *Understanding Poverty* (1993) 3, where he observes: “Most people ...claim that their understanding of poverty is the correct one, based on logical argument and scientific research. [However]...there is no one correct, scientific, agreed definition because poverty is inevitably a political concept, and thus inherently a contested one.”

<sup>194</sup> P Townsend “Post-1945 poverty research and things to come” in J Bradshaw & R Sainsbury (eds) *Researching Poverty* (2000) 5.

<sup>195</sup> See Osmani *Evolving Views on Poverty* 9-12, quoting S Carvalho & H White *Combining the Quantitative and Qualitative approaches to Poverty Measurement and Analysis* Technical Paper No. 366 (1997) World Bank.

<sup>196</sup> M Aliber *Study of the Incidence and Nature of Chronic Poverty and Development Policy in South Africa: An Overview* Chronic Poverty Research Centre Working Paper 3 (2001). Households or individuals are understood to be in chronic poverty when their condition of poverty endures over a period of time. Different researchers propose different time periods as characteristic of chronic poverty (ranging from six months to ten years); this means that the household or individual remains below the poverty line for all or virtually all of this period. Chronic poverty can be a function of an individual's characteristics (e.g. elderly, disabled), or of the environment (e.g. sustained periods of high unemployment or low-wage employment, landlessness), or a combination of the two.



adequate standard of living and other civil, cultural, economic, political and social rights.”<sup>197</sup>

In general, economists perceive poverty as a lack of resources relative to basic needs, whereby it is assumed that consumption or income are good proxies for needed consumables like food or clothing. Monetary wellbeing is based on the premise that someone has adequate income to meet minimal consumption requirements for human welfare. This perspective categorises people as poor if their income falls below a defined income measure, such as the World Bank’s \$1.90 per day.<sup>198</sup> The poverty income line is defined based on the income households require for a specified amount of, for example, food, housing and transportation.

However, this previously prevalent notion that poverty is simply a matter of low income has been challenged around the world over the last two decades. The persistence of poverty in many parts of the developing world, despite impressive economic progress in the last half of the twentieth century, generated a rapid growth in studies on poverty that took a markedly different perspective from the income poverty discourse. The use of income as the sole measurement of poverty has been critiqued as an insufficient and

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<sup>197</sup> United Nations “Poverty and the International Covenant on Economic, Social and Cultural Rights” Statement Adopted by the Committee on Economic, Social and Cultural Rights (04-05-2001) *United Nations* <<http://www2.ohchr.org/english/bodies/cescr/docs/statements/E.C.12.2001.10Poverty-2001.pdf>> (accessed 26-07-2016).

<sup>198</sup> The international dollar-per-day poverty standard was developed by the World Bank for its 1990 *World Development Report* in order to provide a single global measurement for poverty. To account for exchange rates and differences in prices and gross domestic product (GDP), the World Bank had to set a level that would be relevant in underdeveloped, developing, and developed countries despite immense differences in the meaning of poverty around the world. Generally speaking, earning a dollar per day or less means that a person in any country is living in ‘extreme poverty’, which means that that person cannot afford to buy even the most basic human necessities. However, ‘one dollar a day’ is not a literal amount of money. Rather, it means a dollar a day at purchasing power parity in 1985 prices. Purchasing power parity (PPP) is a way to measure the value of currency that allows economists and poverty researchers to compare the standards of living in different countries while accounting for differences in both wages and costs of living. In general, PPP refers to the goods and services that a currency has the power to buy, typically expressed as a ‘basket’ or ‘bundle’ of necessary items. PPP measures how much the same basket or bundle of goods and services costs around the world; allowing for exchange rates, the PPP number in each country should allow people to purchase the same basket of goods and services that a U.S. dollar can purchase in the United States. Because the dollar-a-day standard was conceived in 1990, currency values of 1985 were used as a baseline. In October 2015 the World Bank updated the poverty line to \$1.90 per day. Nevertheless, the term “dollar a day” is still used because it is simpler and easier to remember. To measure “poverty”—as distinguished from “extreme poverty”—the World Bank uses a two-dollars-per-day standard, meaning that anyone earning less than two dollars per day is living in poverty. See *World Bank* <<http://www.worldbank.org/en/topic/poverty/brief/global-poverty-line-faq>> (accessed 20-05-2016).

incomplete picture of the way in which people perceive and experience poverty, the way in which they escape or cope with it, and the policy interventions required to combat poverty.<sup>199</sup> The concept of poverty thus expanded to include a diversity of aspects and perspectives. The preferred one for the purposes of this dissertation is Sen's capability approach as its multidimensionality fits best in the context of a democratic developmental state and a transformative constitution.

Sen's capability approach to poverty recognises that poverty is multidimensional in nature. Underlying the capability approach is a specific conception of what constitutes human well-being. At a very basic level, well-being can be thought of as the quality of a person's being or life, and living can be seen as consisting of a set of "functionings" – the things that a person values doing or being. Thus, the level of well-being depends on the level of functionings, that is, how well a person can do or "be the things he or she has reasons to value", for example how well a person can participate in the life of a community or be free from hunger. The concept of "capability" refers to a person's freedom or opportunities to achieve well-being in this sense.<sup>200</sup>

In terms of understanding poverty, the defining feature of a poor person is severe restriction in opportunities to pursue well-being. Thus poverty consists of the "failure of basic capabilities to reach certain minimally acceptable levels".<sup>201</sup> However, not all kinds of capability failure would count as poverty because poverty indicates extreme deprivation. Only capability failures that are deemed to be basic would count as poverty, in a particular order of priority, as determined by the individuals or communities themselves, for example being adequately nourished, being adequately clothed and sheltered, avoiding preventable morbidity, taking part in the life of a community and being able to appear in public with dignity. Based on this identification of failure across a range of basic capabilities, poverty thus becomes a multidimensional concept. It no longer suffices to conceive of poverty only as a lack of adequate income, as has

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<sup>199</sup> Osmani *Evolving Views on Poverty* 1-8.

<sup>200</sup> A Sen "Well-being, agency and freedom: the Dewey lectures 1984" *Journal of Philosophy* (1985) 82; A Sen *Commodities and Capabilities* (1985).

<sup>201</sup> A Sen *Inequality Reexamined* (1992) 109.

traditionally been done.<sup>202</sup> The capabilities approach was introduced by Sen as a comprehensive framework for conceptualising human well-being and development.<sup>203</sup>

It is evident that globally, notions and measures of poverty have shifted from a preoccupation with economic efficiency to an understanding of the poor as citizens with social, economic and political roles, responsibilities and needs. The various approaches are not mutually exclusive and have many ideas in common. The commonalities involve an acknowledgement of the diversity of causes, experiences and strategies to overcome poverty. The sustainable livelihoods approach as well as the capabilities approach recognise that poverty is intrinsically multi-dimensional in nature. Sen's capabilities approach argues that the philosophical basis for the idea of human welfare is best provided by the concept of capability – the ability of people to live the kind of life they value. Poverty consists of the failure of several kinds of basic capabilities, for example, being educated and living a life of dignity and security. This recognition has overtaken the initial notion that poverty was simply a matter of earnings.

Furthermore, the assessment of poverty and what to do about it in order for people to indeed live the lives they value should be determined primarily by people for themselves. Any attempt to assess the partly subjective, partly objective phenomenon of poverty must draw on the lived experiences of people as perceived by themselves. This is the value of the sustainable livelihoods, well-being and the capabilities approaches. The application of participatory methods – in both assessing the nature of poverty and understanding the livelihood strategies of the poor – has led to recognition of the value of participation itself for the poor in formulating and implementing poverty reduction. Participation is recognised as being of importance “for both instrumental and intrinsic reasons”.<sup>204</sup> Participation can be said to be “instrumentally important” because it supports the development of more effective poverty reduction strategies through listening to the

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<sup>202</sup> Income and assets are according to this theory, merely instruments that affect well-being. They are not in themselves constituents of well-being. Low income should rather be interpreted conceptually as the broader concept of *inadequate command over economic resources*. See Osmani *Evolving Views on Poverty* 3-4.

<sup>203</sup> A Sen *Development as Freedom* (1999).

<sup>204</sup> Osmani *Evolving Views on Poverty* 2.

experiences and solutions offered by people directly affected by poverty, and it is “intrinsically important” because participation in society is a valuable as a capability and locus of empowerment.<sup>205</sup>

Finally, the relationship between poverty and inequality arises in the notion of social exclusion and the capabilities approach. Osmani explains that the concept of social exclusion first appeared in the European context.<sup>206</sup> In recent years the idea has become increasingly associated with the experience whereby specific individuals or groups of people are excluded from partaking in various aspects of social life such as the labour market, educational system or political processes. Exclusion occurs on various grounds in diverse ways, including on the basis of specific attributes, such as gender, age, race, religion, ethnicity, location, occupation, and disease (e.g., HIV/AIDS), or from occupying the lower income strata and social hierarchy.

If one defines poverty in relative terms, as the social distance between the average person and those at the lower end of the scale, then growing inequality can be said to result in growing poverty, even if absolute standards of living improve. As Osmani describes it, growing inequality creates conditions for disempowerment of the poorer classes, even if their poverty has been relatively alleviated.<sup>207</sup> Increasing inequality tips the balance of power in favour of the upper strata, resulting in greater disempowerment of those in the lower strata as they become marginalised from various benefits and activities of social life. Therefore, if one is concerned about poverty, then one should be concerned about inequality too.

This still raises the question of what exactly is the relationship between social exclusion, inequality and poverty. From Sen’s capabilities perspective, one of the basic capabilities whose failure counts as poverty is the capability to take part in the life of the community.<sup>208</sup> Hence inequality can limit participation of the poor in determining their

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<sup>205</sup> Osmani *Evolving Views on Poverty* 2.

<sup>206</sup> Osmani *Evolving Views on Poverty* 6.

<sup>207</sup> Osmani *Evolving Views on Poverty* 7.

<sup>208</sup> Sen *Development as Freedom* (1999) 18-25, 87-110. Sen *Social Exclusion*.

lives and lifting themselves out of poverty. Social exclusion suggests failure of this capability; therefore per Sen, social exclusion constitutes poverty. Thus, from the capability perspective, social exclusion can be viewed as a dimension of poverty. Where inequality exacerbates social exclusion, it can be said to lead to greater levels of poverty.

What can be garnered from these overlapping and complementary notions is that poverty covers both material basic needs as well as capabilities to live the life you value, which includes the capability to participate in the decisions related to that life. The South African approach to poverty has until recently mostly espoused an income perspective, but is moving towards a capability approach.<sup>209</sup> A democratic developmental South African state needs to adopt a multi-dimensional approach to poverty, both in terms of the policy solutions it seeks to apply and measures to reduce poverty and inequality and in terms of the participatory manner in which those policy solutions are examined and determined. This is the conception of poverty that will be used to assess the constitutional jurisprudence of the South African courts, in relation to socio-economic rights and administrative justice, in the chapters that follow.

### 3.3 South African approaches to poverty

The African National Congress (‘ANC’), as the main political party in South Africa since the advent of democracy in 1994, has outlined its approach to poverty in three of its documents. First, *Ready to Govern*<sup>210</sup> laid down plans on key social and economic policies, and affirmed that fighting poverty and combating inequality are the main aims of policy intervention. Second, the ANC commissioned the *Project for Statistics on Living Standards and Development*,<sup>211</sup> to understand in greater depth in the lead up to the country’s first democratic elections, the conditions under which South Africans lived.

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<sup>209</sup> South African National Planning Commission “National Development Plan Vision 2030: Our Future – Make it Work” <<http://www.gov.za/speeches/national-development-plan-2030-31-aug-2016-0000>> (accessed 20-09-2017).

<sup>210</sup> African National Congress *Ready to Govern: ANC policy guidelines for a democratic South Africa adopted at the National Conference* (1992).

<sup>211</sup> SALDRU “Project for Statistics on Living Standards and Development - South Africans Rich and Poor: Baseline Households Statistics” (1993) <<http://www.datafirsttest.uct.ac.za/dataportal/index.php/catalog/5>> (accessed 30-05-2016).

Third, the *Reconstruction and Development Programme ('RDP'): A Policy Framework*<sup>212</sup> presented an integrated, coherent socio-economic policy framework in which the ANC and its partners outlined their approach to poverty as five key programmes: meeting basic needs, developing human resources, building the economy, democratising the state and society, and implementing the RDP. These documents, amongst others, marked the beginning of how poverty was to be understood in a post-apartheid South Africa. However, none of them arrived at a clear singular definition of poverty.<sup>213</sup>

In order to acquire comprehensive, reliable and up-to-date information on poverty in South Africa, the new democratic government officially commissioned the World Bank to conduct the first official review of poverty in South Africa, titled *Key Indicators of Poverty in South Africa*.<sup>214</sup> The report focused almost exclusively on income poverty levels (incorporating the MLL and the HSL). Thereafter, Statistics South Africa ('StatsSA') assumed primary responsibility for the collection of periodic information and statistics in order to build a clear picture of the socio-economic conditions in the country (beyond mere income levels).<sup>215</sup> This is done periodically via the census, the general household surveys ('GHS') and income and expenditure surveys.<sup>216</sup>

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<sup>212</sup> White Paper on Reconstruction and Development, Cape Town, 15 November 1994, <<http://www.gov.za/sites/www.gov.za/files/governmentgazetteid16085.pdf>> (accessed 30-05-2016).

<sup>213</sup> Magasela "Towards a Constitution-based definition of poverty" in *State of the Nation* 52.

<sup>214</sup> World Bank/SALDRU *Key Indicators of Poverty in South Africa* (1995).

<sup>215</sup> In addition, independent researchers and institutions have contributed significantly to the development of the understanding of poverty and measurement of its many facets. For example Julian May's highly regarded report titled *Poverty and Inequality in South Africa*, discussed and analysed the multi-dimensional nature of poverty and its various measures. See J May (ed) *Poverty and Inequality in South Africa* Report prepared for the Office of the Executive Deputy President and the Inter-Ministerial Committee for Poverty and Inequality (1998).

<sup>216</sup> In 1996 the post-apartheid government conducted its first population census. This was followed by a census in 2001 and 2011 conducted by Statistics SA (Stats SA). A Community Survey was held in 2006 and in 2016. The census aims to provide comprehensive data for improved planning and to aid development. The general household survey (GHS) is an annual household survey conducted by Stats SA since 2002. The survey replaced the October Household Survey (OHS), which was introduced in 1993 and was terminated in 1999. The survey is aimed at determining the progress of development in the country by measuring, on a regular basis, the performance of programmes as well as the quality of service delivery in a number of key service sectors in the country. The GHS covers six broad areas, namely education, health and social development, housing, household access to services and facilities, food security, and agriculture. Stats SA also conduct an Income and Expenditure Survey (IES) every 5 years, which seeks to establish what South Africans spend their money on. The last IES was conducted between September 2010 and August 2011. The Quarterly Labour Force Survey was first conducted in January 2008 by Stats SA, is specifically designed to measure the dynamics of the South African labour market, producing indicators such as employment, unemployment and inactivity. See <<http://www.statssa.gov.za/>> (accessed 30-05-2016).

There are many other contributions to the study of poverty in South Africa showing the levels of poverty and trends, which have been influential in the formulation of policy concerning poverty. However, these reports and documents show an inconsistency in their choice of poverty definition and measurement and they predominantly use money-metric definitions and measures of poverty.<sup>217</sup> In South Africa, income is also used as the basis upon which eligibility for government grants such as pensions and housing subsidies are calculated.<sup>218</sup> Due to this inadequate conceptualisation of poverty in South Africa, to date there is still no official definition of poverty.

The challenge that arises is how to measure poverty in multi-dimensional conceptual terms, in order to chart the “progressive realisation” of a reduction in poverty over time, the achievement of targets such as the MDGs/SDGs and the expansion of rights and freedoms in a South African democratic developmental state. Accepting that poverty is a multi-faceted reality, no one set of indicators will give a complete picture of the extent of poverty in any given situation. A set of holistic measures of poverty and inequality, which captures the multi-dimensional nature of poverty and incorporates a qualitative notion of empowerment, is required. The Bill of Rights, as the supreme law that captures the transformative commitments and foundational values adopted as part of the political settlement in South Africa, should be the basis for understanding poverty and designing measures and policies in the fight against poverty and inequality.

Furthermore, the conception of a South African democratic developmental state requires policy and law to be attentive to the participatory dimensions as well as the material dimensions of poverty. The economic direction set by the developmental state, alongside

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<sup>217</sup> See summary of various documents in Magasela “Towards a Constitution-based definition of poverty” in *State of the Nation* 55.

<sup>218</sup> See for example *Regulations Relating to the Application for and Payment of Social Assistance and the Requirements or Conditions in Respect of Eligibility for Social Assistance* [GN R 621 in GG 39007 of 21-07-2015] in terms of Social Assistance Act 13 of 2004, where the financial criteria for eligibility for each of the various grants are set out in Annexure B. See also the National Housing Code 2009 have been difficult to measure which stipulates that in order to be eligible for a housing subsidy, an applicant's gross monthly household income must not exceed R3 500. In both of these instances, income is the only measure of poverty used to identify eligibility for these poverty-related programmes. Furthermore, the income thresholds for the grants were only adjusted for inflation for the first time since the inception of the grants, in 2009, and in the case of the housing subsidy, the income level has not changed in the past 10 years to cater for inflation.



the crucial capacity to implement such economic strategy side by side with the private sector, must be underpinned by the socio-economic empowerment of residents and citizens to take advantage of the opportunities created. This understanding of poverty should encompass socio-economic rights and civil-political rights, as well as participatory rights. The international law and literature on an interdependent, human rights-based approach to poverty provides some guidance and will be discussed in the following section as a foundation for the analysis of the interaction between socio-economic rights and administrative justice in addressing poverty and inequality in a South African democratic developmental state.

### 3.4 The situation of poverty in South Africa

The purpose of the Constitution of the Republic of South Africa 1996, as contained in the Preamble, includes healing the divisions of the past and improving the quality of life of all citizens. These divisions and conditions must be understood in the context of the impact that colonialism, apartheid and capitalism has had on South African society over the past four centuries.<sup>219</sup> The impact is still largely felt in a post-apartheid South Africa, manifesting in enduringly high levels of poverty and racial inequality. This section provides an overview of the current situation of poverty in South Africa and trends over the past 23 years since democracy.<sup>220</sup> These manifestations of poverty and inequality

<sup>219</sup> Liebenberg *Socio-Economic Rights* 26. For a historical account of the impact of colonialism, apartheid and capitalism on South African society, see S Terreblanche *A History of Inequality in South Africa: 1652–2002* (2002).

<sup>220</sup> This section provides a summarised but holistic picture of poverty and inequality in South Africa, based on a multi-dimensional approach. The data provided is largely based on the Statistics South Africa Census data between 1996 and 2011. See Statistics South Africa *Census 2011 Statistical Release* <<http://www.statssa.gov.za/publications/P03014/P030142011.pdf>> (accessed 16-05-2016). Other evidence is drawn from the following sources: <sup>220</sup> Presidency *Development Indicators* (2014) 4 <<http://www.dpme.gov.za/publications/Reports%20and%20Other%20Information%20Products/Development%20Indicators%202014.pdf>> (accessed 16-06-2017); A Whiteford & D Posel *A Profile of Poverty: Inequality and Human Development in South Africa* (1995); I Woolard & M Leibbrandt “Measuring Poverty in South Africa” in H Bhorat, M Leibbrandt, M Maziya, S van der Berg & I Woolard (eds) *Fighting Poverty: Labour Markets and Inequality in South Africa* (2001) 41; H Bhorat, M Leibbrandt, M Maziya, S Van der Berg & I Woolard (eds) *Fighting Poverty: Labour markets and Inequality in South Africa* (2001); C Meth & R Dias “Increases in poverty in South Africa: 1999–2002” *Development Southern Africa* (2004) 21(1) 59-85; S Van der Berg, R Burger, M Louw, & D Yu, *Trends in Poverty and Inequality since the Political Transition* Stellenbosch Economic Working Papers (2005), <<http://www.ber.sun.ac.za/downloads/2005/workingpapers/WP-01-2005.pdf>> (accessed 16-05-2016); H Bhorat & R Kanbur (eds) *Poverty and Policy in Post Apartheid South Africa* (2006); H Bhorat, P Naidoo & C Van der Westhuizen *Shifts in Non-Income Welfare*



require urgent and substantial redress in order to achieve the laudable aims of a transformative Constitution, as laid out in the Preamble.

The population of South Africa grew from approximately 40,5 million in 1996 to about 56 million in 2016.<sup>221</sup> The overall trends indicate improvements and reduction in poverty – at least until the impact of the global economic recession hit in 2008 – chiefly due to higher employment levels combined with increased government provision of social grants and basic services. However, inequality continues to prevail, indicating that something more and different needs to be done.

### 3 4 1 Education

Despite significantly increased access to education across South Africa since 1994, the quality of education for poor learners continues to be a challenge, making it difficult for poor people to obtain decent employment and thereby perpetuating the cycle of poverty.<sup>222</sup> A low quality education results in lower levels of employment, or unskilled, insecure work in peripheral employment.

The inequities based on race of the apartheid regime have largely reproduced themselves along race and class lines in the education system.<sup>223</sup> The lack of quality of education for the vast majority of poor learners is apparent from the data, for example, showing that children from poor African households are significantly more likely to drop out of school.<sup>224</sup> Furthermore, in 2011 36,5% of the White population attained a level of

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*in South Africa: 1993-2004* Development Policy Research Unit Working Paper No 06/108 (2006) DPRU <<http://www.dpru.uct.ac.za/wp-06108-shifts-non-income-welfare-south-africa-1993-2004>> (accessed 18-06-2017); S van der Berg, M Louw & L Du Toit *Poverty Trends since the Transition: What we know* (2007); H Bhorat & C van der Westhuizen *Economic Growth, Poverty and Inequality in South Africa: The First Decade of Democracy* (2008).

<sup>221</sup> “Mid-year population estimates, 2016” StatsSA <<http://www.statssa.gov.za/publications/P0302/P03022016.pdf>> (accessed 19-06-2017).

<sup>222</sup> See for example N Spaul “Poverty & Privilege: Primary School Inequality in South Africa” *International Journal of Educational Development* 33 (2013) 436-447.

<sup>223</sup> StatsSA *Census 2011* 30-39.

<sup>224</sup> The term ‘drop-out’ is used here to refer to children of school age who are not attending school and have not completed their education.

education higher than Grade 12, compared to 8,3% of the African population, 7,4% of the Coloured population and 21,6% of Indian persons of Asian origin.<sup>225</sup>

However, the proportion of African persons aged 20 years who have no schooling halved from 19,1% in 1996 to 8,6% in 2011. There was also a considerable increase in the percentage of African persons who completed higher education from 7,1% in 1996 to 11,8% in 2011.<sup>226</sup> In 2014, 84% of adults in South Africa were literate, up from 73% in 2002.<sup>227</sup> The share of 5-year olds attending early childhood development facilities more than doubled from 39% in 2002 to 87% in 2014.<sup>228</sup>

The problems facing historically black schools, particularly in poor communities, still reflect the long history before 1994 of underfunding, lack of adequate infrastructure, impoverishment, poor management systems, poorly trained educators and racially biased curricula.<sup>229</sup> Remedying them requires both improved resourcing and qualitative changes in systems, cultures and relationships, in order to prevent the ongoing cycle of poverty.

### 3.4.2 Income

The most common way to measure poverty in South Africa is still income-based. Using various income poverty measures, the number of people living in poverty declined between 1999 and 2007, although the rate of this decline was slow.<sup>230</sup> The percentage of households living in poverty also declined between 2006 and 2011 but is still high. Out of 100 households, 45 live below the poverty line.<sup>231</sup>

*Census 2011* found that over the past ten years, the average annual household income for all households in South Africa more than doubled. It was up to R103 204 from R48 385 recorded in *Census 2001*. This represents an increase of 113,3% in nominal terms – the

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<sup>225</sup> StatsSA *Census 2011* 36.

<sup>226</sup> StatsSA *Census 2011* 36.

<sup>227</sup> Presidency *Development Indicators* 4.

<sup>228</sup> Presidency *Development Indicators* 4.

<sup>229</sup> Spaul (2013) *International Journal of Educational Development*.

<sup>230</sup> Presidency *Development Indicators* 28-29.

<sup>231</sup> Presidency *Development Indicators* 30.

Consumer Price Index indicates that income should have increased by 77,5% during this period to stay in line with inflation.<sup>232</sup>

However, the income of the richest 10% of the population increased at a faster rate.<sup>233</sup> When comparing the percentage income of the richest and poorest quintiles, the deep structural nature of poverty in South Africa is evident. Mass poverty in South Africa is thus also associated with very high levels of inequality. South Africa ranks among one of the most unequal societies in the world. When using the Gini-coefficient measurement, inequality increased from 0.64 in 1995 to 0.67 in 2005 but has since improved to 0.65 in 2010/11.<sup>234</sup> According to the World Bank in 2009, South Africa had the highest gini-index in the world at 63.1.<sup>235</sup> Although there is a growing black middle class, inequalities are still associated strongly with race and gender, as well as location.

*Census 2011* reflects the significant differences in average annual household income across the different population groups. Black African-headed households have an average annual income of R60 613 in 2011, while Coloured-headed households had an average of R112 172 in 2011, and the figure for Indian/Asian-headed households was R251 541 and White-headed households had the highest average household income at R365 134 per annum. A comparison with the figures from 2001 does, however, show a bigger increase for black African-headed households of 169,1% as opposed to an 88,4% increase for white-headed households.<sup>236</sup>

Poverty also still reflects apartheid settlement patterns. Most poor households are found in the former Bantustan regions, informal settlements and historically black townships. Poor households make up just over two-thirds of the population of the former Bantustans

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<sup>232</sup> StatsSA *Census 2011* 41.

<sup>233</sup> Presidency *Development Indicators* 27.

<sup>234</sup> Presidency *Development Indicators* 29.

<sup>235</sup> See World Bank figures for 2009 which give South Africa a 63.1, higher than all other countries on the list - Brazil at 54.7 and Honduras at 57 <<http://www.worldbank.org/en/country/southafrica/overview>> (accessed 06-05-2016). Gini index measures the distribution of income or expenditure of individuals or households in an economy and how much it deviates from a perfectly equal distribution. A Gini index of 0 indicates perfect equality, while an index of 100 represents perfect inequality.

<sup>236</sup> StatsSA *Census 2011* 41.

and, in the rest of the country, in informal settlements and townships. In the former Bantustan regions, only a third of poor households survive mainly on earned income.<sup>237</sup>

### 3 4 3 Employment

The apartheid system deprived black households of economic resources, largely in order to prevent self-employment and generate a low-wage labour force. A range of laws limited the access of Africans, in particular, to land, education, training and healthcare, markets and finance, pushing them far away from economic centres. At the same time, the State failed to build up household and economic infrastructure in black communities. Current and ongoing high unemployment and the difficulties facing new and micro enterprises reflect, above all, the economic marginalisation of the majority of the population under apartheid. This marginalisation, together with the low quality of education, reproduces the deprivation of the poor, mainly African population, who generally find it particularly difficult to gain the skills and the social and economic resources required to take advantage of economic opportunities.<sup>238</sup>

The official (narrow) unemployment rate<sup>239</sup> declined from 29.4% in September 2001 to 23.6% in June 2009, and then increased again to 27.7% in 2017.<sup>240</sup> Unemployment remains unacceptably high. Over the past few years South Africa witnessed massive job losses<sup>241</sup> due largely to the global economic crisis and ongoing decline in economic growth.<sup>242</sup>

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<sup>237</sup> Presidency *Development Indicators* 27, 30, 31.

<sup>238</sup> Presidency *Towards a Poverty Strategy* 31. See also Spaul (2013) *International Journal of Educational Development*. See also discussion of the role of the state in the promotion of economic growth and development in chapter two.

<sup>239</sup> This equates the unemployment rate with the number of people who were without work in the week preceding the interview, which have taken active steps to look for work and were available for work, and excludes discouraged work-seekers.

<sup>240</sup> See Quarterly Labour Force Survey Quarter 1: June 2017 <<http://www.statssa.gov.za/publications/P0211/P02111stQuarter2017.pdf>> (accessed 14-06-2017).

<sup>241</sup> Van der Berg, Louw & Du Toit *Poverty Trends* show that approximately 1,7 million jobs were created between 1995 and 2002 and 1,2 million between 2002 and 2006. However, it is estimated that approximately 870,000 jobs were lost in South Africa in 2009 due to the global recession. See “SA unemployment edges lower, job losses halted” *Mail & Guardian* (9 February 2010).

<sup>242</sup> South Africa experienced an average growth rate of approximately 5% in real terms between 2004 and 2007. However, the period 2008 to 2012 only recorded average growth just above 2%; to a certain extent the effect of the global economic crisis. In 2017 South Africa entered a recession – technically meaning that SA

Employment levels are particularly low among the African population, poor women and young people. Census 2011 results show that among the black African population, the unemployment rate was 35,6% while among the white population group the unemployment rate was 5,9%.<sup>243</sup> Census 2011 results also show that the unemployment rate among black African women was 41,2% based on the official definition. In contrast, the unemployment rate among white women was 6,9%. With regard to the situation of young people in the South African labour market, the Census 2011 results show that the unemployment rate among youth aged 15-24 years was around 50%.<sup>244</sup> As a result, these groups suffer more from poverty and dependence.

For most households, the immediate cause of poverty is inadequate earned income due to the fact that working-age adults in poor households are unable to find employment. Most poor households depend on remittances, pensions or grants instead of wages, salaries or profits. As at 30 April 2017, 3.3 million people received an old-age grant (OAG) while 12.1 million children received a child support grant (CSG). The redistribution to over 17 million beneficiaries through the fiscus has substantially improved conditions in poor households.<sup>245</sup> However, the developmental impact of grants has been the subject of much debate in South Africa, in particular in the context of the desired shift from a welfare state to a developmental state. The debate revolves around the financial sustainability and developmental outcomes of social grants. The evidence overwhelmingly shows that social grants do indeed have developmental attributes.<sup>246</sup>

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experienced negative growth for two consecutive quarters. See [www.statssa.gov.za](http://www.statssa.gov.za) for more detail and current figures (accessed 14-06-2017).

<sup>243</sup> StatsSA *Census 2011* 51, 55.

<sup>244</sup> StatsSA *Census 2011* 51, 55.

<sup>245</sup> SASSA A statistical summary of social grants in South Africa Fact Sheet: Issue no 4 of 2017 <<http://www.sassa.gov.za>> (accessed 14-06-2017).

<sup>246</sup> See K Siebrits & S Van der Berg *Social Assistance Reform during a Period of Fiscal Stress* (2010) 21-22, a report prepared for the Financial and Fiscal Commission, which provides a summary of the fiscal implications as well as the developmental outcomes debate. Several studies have found that: a.) grant receipts boost the food spending of beneficiaries (Community Agency for Social Enquiry (CASE) *Review of the Child Support Grant: Uses, Implementation and Obstacles* (2008) Report compiled for the Department of Social Development, the South African Social Security Agency (SASSA) and the United Nations Children's Fund (UNICEF) 31); b.) households who receive grants spent relatively more on basic necessities (food, fuel, housing, and household operations) and relatively less on medical care, debt service and tobacco than households who did not receive grants (M Samson, U Lee, A Ndlebe, K MacQuene, I van Niekerk, V Gandhi, T Harigaya & C Abrahams *The*

### 3 4 4 Housing and basic services

Having clean water, adequate sanitation, light and heat as well as decent housing is critical for overcoming poverty. Considerable progress has been made in this area since democracy.

The average household size for South Africa decreased from 4,5 in 1996 to 3,6 in 2011. Over that period there was a steady increase in the percentage of households living in formal dwellings; the percentage of households living in traditional dwellings has almost halved while the percentage of households living in informal dwellings has decreased from 16,2% in 1996 to 13,6% in 2011.<sup>247</sup>

The number of households expanded from 10.8 million to 15.6 million between 2002 and 2014. Over the same period, the share of households accessing basic services increased from 77% to 86% in the case of electricity, from 80% to 86% for water infrastructure and the share of households accessing sanitation went up from 62% to 80%.<sup>248</sup> Between 2001 and 2011 access to piped water on site increased from 60% to 73,4%.<sup>249</sup> The proportion of households that have flush toilets connected to the sewage system increased from 49,1% in Census 2001 to 57% in Census 2011. The percentage of households that were without toilets declined significantly from 13,6% and in Census 2001 to 5,2% in Census 2011.<sup>250</sup>

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*Social and Economic Impact of South Africa's Social Security System* (2004) Report commissioned by the Economics and Finance Directorate of the Department of Social Development, 75-77); c.) nutritional benefits to children increased with increases in food expenditure associated with receipt of child support grants and social pensions (J Aguero, M Carter & I Woolard "The Impact of Unconditional Cash Transfers on Nutrition: the South African Child Support Grant" *IPC Working Paper No 39* (2007); F Yamauchi *Early Childhood Nutrition, Schooling and within-sibling Inequality in a Dynamic Context: Evidence from South Africa* (2005); M Williams *The Social and Economic Impacts of South Africa's Child Support Grant* EPRI Working Paper No 39 (2007) 55-59); and d.) receipt of child support grants and old-age pensions encouraged school attendance among child support grant recipients and children living with pensioners (A Case, V Hosegood & F Lund "The Reach and Impact of Child Support Grants: Evidence from KwaZulu-Natal" in *Development Southern Africa* 22(4) (2005) 467-482; D Budlender & I Woolard *The Impact of the South African Child Support and Old Age Grants on Children's Schooling and Work* TECL Paper No 43 (2006); M Leibbrandt, I Woolard, A Finn & J Argent *Trends in South African Income Distribution and Poverty since the Fall of Apartheid* OECD Social, Employment and Migration Working Papers No 101 (2010) 62-63).

<sup>247</sup> StatsSA Census 2011 57.

<sup>248</sup> Presidency *Development Indicators* 4.

<sup>249</sup> StatsSA Census 2011 59.

<sup>250</sup> StatsSA Census 2011 60.

Households using electricity for lighting increased from 58,2% in 1996 to 84,7% in 2011.<sup>251</sup>

Despite improvements in government services for the poor, there are still many delays in obtaining services, lower levels of service, difficulties in paying for services and relatively high levels of disconnection of services in poor communities.<sup>252</sup> Many of the poorest municipal districts as well as informal settlements and farm workers, have proven difficult to reach adequately. As a result, poor households continue to lag in access to government services.<sup>253</sup> These shortfalls place a further burden on women and girls, who continue to undertake most household labour. Moreover, in the context of persistent inequality and minimal changes in the spatial geography of apartheid, African communities overall continue to lag behind historically white areas. The quality of service in historically black areas is often worse than in historically white communities.

### 3 4 5 Health

Adequate healthcare is also critical in the struggle against poverty to maintain a good quality of life, ensure adults are able to work and care for their families, and that children grow up healthy. Largely due to the roll-out of anti-retroviral treatment, South Africa's life expectancy increased by 9 years from 52 years in 2004 to 61 years in 2014.<sup>254</sup> The infant mortality rate also dropped from 58 to 34 deaths per 1000 live births between 2002 and 2014. Over the same period, the under 5-mortality rate dropped from 85 to 44 deaths per 1000 live births.<sup>255</sup>

Trends in the Maternal Mortality Ratio measuring the well-being of mothers (a key SDG indicator), show some progress from 281 per 100,000 in 2008 to 197 per 100,000 in 2011,

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<sup>251</sup> StatsSA *Census 2011* 61. Borat, Naidoo & Van der Westhuizen *Shifts in Non-Income Welfare in South Africa* in analysing welfare shifts in the post-apartheid period, show that access to formal housing grew by 42% and 34% for the poorest deciles 1 and 2 respectively between 1993 and 2004, and 21% and 16% for deciles 3 and 4. Access to piped water increased by 187% in the poorest decile over this period, while the growth was 31% in the 4th decile. Access to electricity for lighting for the poorest households grew by an extraordinary 578%. It is clear from their study that the delivery of basic services has been strongly pro-poor. Borat et al also show that while in 1993 40% of all South African households were asset- (and service-) poor; by 2004 this figure had been almost halved to 22%.

<sup>252</sup> Presidency *Towards a Poverty Strategy* 41.

<sup>253</sup> Presidency *Towards a Poverty Strategy* 42.

<sup>254</sup> Presidency *Development Indicators* 4.

<sup>255</sup> Presidency *Development Indicators* 4.



however are still unacceptably high.<sup>256</sup> Furthermore, HIV prevalence in the total population showed a slight increase from 8.8% to 9.9% during the 2001-2010 decade. However, it subsequently stabilised at around 10% from 2011 to 2014.<sup>257</sup> Amongst pregnant women attending antenatal care in the public sector, HIV prevalence increased from 24.8% in 2001 to 29.1% in 2006. HIV prevalence rates subsequently stabilised at 29% from 2007 to 2012, except for 2010 where prevalence reached 30%. These trends reflect the dividends of a massive and largely successful ARV therapy (ART) programme, which has seen the number of patients on treatment rapidly scaled up from 113 375 in 2005 to 2.8 million in 2014. Another important positive trend is the decline in HIV prevalence amongst youth 15-24 years, from 15% in 2001 to 8.7% in 2014.<sup>258</sup>

In terms of access to healthcare, many challenges thus remain. The public health system continues to face underfunding and understaffing, particularly in hospitals and clinics in poor communities. People in poor households are more likely to use public healthcare and there is generally a huge public /private divide in health care due to a degraded public health system and lack of social health insurance.<sup>259</sup> Poor people are therefore much more likely to face long waiting times, lack of medicines, rude or uncaring staff, inadequate opening times and long distances to facilities.<sup>260</sup>

### 3 4 6 Social exclusion and participation

South Africa is thus still a deeply divided and highly inequitable society despite notable advances made to date. As seen from the data above, the country is divided largely by race, gender, age and where one lives. High levels of unemployment amongst Africans,

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<sup>256</sup> Presidency *Development Indicators* 44.

<sup>257</sup> Presidency *Development Indicators* 45-47.

<sup>258</sup> Presidency *Development Indicators* 45.

<sup>259</sup> See M Pieterse *A Benefit-Focused Analysis of Constitutional Health Rights* (2005) Unpublished PhD thesis, University of the Witwatersrand, 150-174; M Pieterse "Indirect Horizontal Application of the Right to have Access to Health Care Services" (2007) 23 *SAJHR* 157-179. The National Government introduced a National Health Insurance in 2012 to address the deficiencies in the health system for poor people, which is understood as mostly skewed due to the health care financing scheme. The NHI was piloted in 10 districts in 2012 but at the time of writing had not yet been fully resourced or implemented. See Department of Health *Policy on National Health Insurance* <<http://www.gov.za/sites/www.gov.za/files/nationalhealthinsurance.pdf>> (accessed 29-09-2016).

<sup>260</sup> See Presidency *Towards a Poverty Strategy* 44-45.



the youth and women, and poverty in general also serve to perpetuate the social exclusion experienced by many. This social fragmentation manifests itself in various ways, including high levels of domestic violence, substance abuse, high levels of criminality, hostility towards people of foreign origin, low levels of mutual respect, social solidarity and other behaviours.<sup>261</sup>

The achievement of developmental objectives to reduce poverty and inequality will largely be determined by the effectiveness of the rights-based and institutional framework created by the Constitution and associated policies and laws. Over the past two decades, the government has made considerable progress in transforming the institutions of the state, in cultivating equitable policies across spheres, and in creating a representative<sup>262</sup> democratic culture. However, participatory democratic institutions, culture and environment where citizens, in particular the poor and marginalised, articulate and pursue their views and ideals, need strengthening. Avenues for participation exist within the institutional processes of the legislature and the executive, however again these are limited for marginalised communities largely due to lack of access and information. Access to the courts is also limited because of a dearth of resources and knowledge of the processes for the enforcement of rights. This leads to increased marginalisation, exclusion and disempowerment of poor communities, as frustration grows with their situation of poverty and the slow progress in the realisation of rights.<sup>263</sup> The design and implementation of poverty reduction initiatives should therefore ensure greater and more effective participatory governance towards empowerment and social inclusion. These aspects of participatory democracy are discussed further below, as essential elements of the transformative potential of the Constitution to support the reduction of poverty and inequality.

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<sup>261</sup> See Presidency *Towards a Poverty Strategy* 54-55.

<sup>262</sup> See Presidency *Development Indicators* 60-61. Voter turnout on average per province has tended to be very high in every election since the advent of democracy in 1994, however it is steadily decreasing overall. The turnout in 2014 was 73.48%, a decrease from the 77.3% turnout in 2009, and from the turnout of 76.7% in 2004. Voter turnout in 1999 was 89.3% and in 1994 it was 86.87%.

<sup>263</sup> See Presidency *Development Indicators* 90, in relation to the general decline since 2004 in public trust and confidence about government's performance in delivering services.

### 3.5 An interdependent human rights-based approach to poverty

In this section, I elaborate on the interdependence of socio-economic rights and civil and political rights, including the right to administrative justice, in international treaty law and soft international law. Historically these categories of rights have been separately defined in international law, but seen as interdependent, especially more recently in the context of global poverty eradication. The purpose is to demonstrate the potential complementarity of socio-economic rights and the right to administrative justice in the South African Constitution and jurisprudence, in a democratic developmental state seeking to address poverty and inequality.

During the last half of the twentieth century, international human rights became a worldwide and increasingly important political and legal project.<sup>264</sup> At the second session of the Commission on Human Rights (1947), it was decided that three working groups would simultaneously draft a declaration, a single treaty, and measures of implementation of that treaty, all of which would constitute an International Bill of Rights. The *Universal Declaration of Human Rights* ('UDHR') was drafted and adopted by 1948, and contained essentially the entire range of human rights being discussed at the time. After the adoption of the UDHR, the ensuing period (1949-1966) was largely devoted to drafting a convention on human rights and producing a mechanism for their implementation. After nearly twenty years, this work led eventually to the adoption by the UN General Assembly on 16 December 1966 of three separate instruments: the *International Covenant on Civil and Political Rights* ('ICCPR'), the Optional Protocol to that Covenant, and the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR').<sup>265</sup>

The UN debates leading up to the decision of the General Assembly to divide human rights into two instruments, reveal three broad categories of reasons for the separation:

<sup>264</sup> See generally H Steiner, P Alston & R Goodman *International Human Rights in Context: Law, Politics, Morals* 4 ed (2012).

<sup>265</sup> The *International Covenant on Civil and Political Rights* (1966) and the *International Covenant on Economic, Social and Cultural Rights* (1966) were formulated out of the UDHR and together constitute the International Bill of Rights.

implementation-based reasons, ideological or political reasons and pragmatic reasons.<sup>266</sup> The implementation-based reasons involved a view of socio-economic rights as different in nature from civil-political rights due to the former's non-justiciability and therefore susceptibility to different procedures of implementation. Ideological reasons were based on the Cold War division between East and West and communism and capitalism, with socio-economic rights being associated with communism. Finally, the practical reasons included the need to rework the wording of socio-economic rights and a lack of acceptance from all states for the socio-economic rights.<sup>267</sup>

### 3 5 1 The interdependence of human rights

Despite the separation of civil and political and socio-economic rights into two separate international treaties, the interrelationship among the various human rights has since been established in international law. Following the simultaneous consideration, approval and opening for signature of the two Covenants, the 1968 Proclamation of Tehran emerged. Article 13 of the Proclamation states:

“Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights, is impossible. The achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development.”<sup>268</sup>

<sup>266</sup> See C Scott “The interdependence and permeability of human rights norms: Towards a partial fusion of the international covenants on human rights” *Osgoode Hall Law Journal* Vol 27(4) 1989 770-878, 791-813 for a detailed historical discussion of the reasons for the separation of the two instruments.

<sup>267</sup> Scott (1989) *Osgoode Hall Law Journal* 27(4) 794-798.

<sup>268</sup> *The Proclamation of Tehran, 1968*, Final Act of the International Conference on Human Rights, Tehran, UN Doc A/CONF.32/41, available at <<http://hrlibrary.umn.edu/instrree/l2ptchr.htm>> (accessed 24-07-2016). See also the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights, 25 June 1993, UN doc A/CONF. 157/24 Part I, para 5 <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>> (accessed 24-07-2016). This was reiterated in 1969 in the Declaration on Social Progress and Development, adopted 11 Dec. 1969, GA Res 2542 (XXIV), UN GAOR 24<sup>th</sup> Sess, Supp NO 30, at 49 UN Doc A/7630 (1969) and again in Article 1(a) of UN General Assembly Resolution 32/130, ‘Alternative approaches and ways and means within the UN system for improving the effective enjoyment of human rights and fundamental freedoms’ (16 December 1977) as follows: “[A]ll human rights and fundamental freedoms are indivisible and interdependent.” See also Scott (1989) *Osgoode Hall Law Journal* 779-86. Furthermore, the ICCPR’s preamble confirms the notion that civil and political freedom can

Craig Scott explains two ways in which interdependence can be understood: “organic and related interdependence”.<sup>269</sup> “Organic interdependence” refers to one right forming a part of another right and may therefore be incorporated into that latter right. He gives the example of the relationship between ICCPR 6(1) “the right to life” and ICESCR 11(1) “the right to an adequate standard of living”. Such an approach implies an overlap between the two articles. “Related interdependence” refers to the way in which rights are mutually reinforcing or mutually dependent, but distinct. Scott explains that with “related interdependence”, rights are equally important as well as complementary, but they remain distinct.<sup>270</sup>

The interdependence of human rights can also be understood conceptually, as grounded in the social experience of human beings. As described in the section on the multidimensional perspective of poverty, the interdependence of rights attempts to capture the idea “that values and norms directly related to the full development of human potential cannot be protected in isolation from one another”.<sup>271</sup>

Scott suggests “upwards” and “downwards” relationships between human rights and the social realities of the poor.<sup>272</sup> The “upwards” relationship equates to the foundation of human rights and the interpretation of legal norms being grounded in social experience.<sup>273</sup> On the other hand, the “downwards” relationship provides information about human rights and their interpretations that lead to an empowerment process whereby recipients of human rights guarantees are able to relate the law to their individual life experience.<sup>274</sup>

The interdependent approach thus rests on the realities of people’s lives as a whole and the consequent need for the promotion, in tandem, of rights from both traditional

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only be achieved if conditions exist whereby everyone can enjoy their civil and political rights as well as their economic, social and cultural rights. The ICESCR has a very similar paragraph in its preamble.

<sup>269</sup> Scott (1989) *Osgoode Hall Law Journal* 27(4) 794-798.

<sup>270</sup> Scott (1989) *Osgoode Hall Law Journal* 27(4) 794-798.

<sup>271</sup> P Alston “Out of the Abyss: The challenges confronting the new UN Committee on Economic, Social and Cultural Rights” (1987) 9 *Human Rights Quarterly* 332, 352.

<sup>272</sup> Scott (1989) *Osgoode Hall Law Journal* 27(4) 788.

<sup>273</sup> Scott (1989) *Osgoode Hall Law Journal* 27(4) 788.

<sup>274</sup> Scott (1989) *Osgoode Hall Law Journal* 27(4) 788.

categories. For example, the right to a fair hearing in administrative cases concerning socio-economic rights points to the key role of the participation of the poor in the improvement of their own quality of life.<sup>275</sup> A South African democratic developmental state should view the interdependence of rights as a reflection of a holistic understanding of the reality of enduring poverty. Participatory democracy and autonomy must underpin the democratic developmental state and its transformative poverty reduction project. Civil and political rights, and the right to administrative justice in particular, form the participatory elements alongside the delivery of socio-economic rights. I argue that their interdependence is relational, as per Scott's approach, because of the way in which these rights are separate, but equally important and complementary in a democratic developmental state working towards the elimination of poverty and inequality.

The principle of interdependence has continued to appear in UN resolutions, views, general comments, and individual complaints as well as in broader UN human rights programmes.<sup>276</sup> This principle has been foundational to the international human rights-based approach to poverty, which further reinforces how we conceptualise and understand the interaction between socio-economic and administrative justice rights in a South African democratic developmental state.

### 3 5 2 A human rights-based approach to poverty

The Vienna Declaration of the 1993 World Conference on Human Rights observed that the "existence of wide-spread extreme poverty inhibits the full and effective enjoyment of human rights" and that "extreme poverty and social exclusion constitute a violation of human dignity".<sup>277</sup> Building on this, Mary Robinson, the former UN High Commissioner

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<sup>275</sup> See, for example, Commission on Human Rights Resolution 1987/21, "Popular participation in its various forms as an important factor in development and in the full realization of all human rights" (10 March 1987) in UN Doc. E/CN.4/1987/L.11/Add.5.

<sup>276</sup> See Scott (1989) *Osgoode Hall Law Journal* 27(4) 815.

<sup>277</sup> Vienna Declaration para 14.

for Human Rights, stated that lawyers should use human rights principles to pursue the central development objective, which is the eradication of poverty.<sup>278</sup>

The question for human rights lawyers then becomes what is the nature of poverty in international human rights terms? Is poverty a violation of human rights? If poverty is a violation of human rights, of what precisely does the violation consist?<sup>279</sup> This can be answered in various ways: (1) that the violation of human rights causes poverty; or (2) that as a result of being poor, people's rights are violated; or (3) that many human rights violations can be classified as poverty violations; or (4) that the condition of poverty is to be viewed as a distinct violation of specific human rights, such as the right to subsistence or the right to health.

The conceptual connection between poverty and human rights asserts that human rights are strong tools for fighting poverty, even if poverty is often conceptually seen as distinct from human rights. Andreassen argues that the two concepts have a vital relationship with one another, reflecting a profound, intrinsic causality.<sup>280</sup> He states that human rights violations cause poverty, and poverty reflects violations of human rights.<sup>281</sup> Therefore, the reduction of poverty will entail recognition, protection and implementation of various human rights.

Osmani distinguishes three ways in which human rights can be identified as relevant to poverty: "constitutive relevance", "instrumental relevance" and "constraint-based relevance".<sup>282</sup> The concept of constitutive relevance of human rights is based on an understanding of what it means to be poor. Sen's capabilities approach says that a poor person is someone who is deprived of basic capabilities, for example to be free from

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<sup>278</sup> M Robinson "Bridging the gap between human rights and development: From normative principles to operational relevance" United Nations High Commissioner for Human Rights, World Bank (3 December 2001).

<sup>279</sup> Steiner, Alston & Goodman *International Human Rights in Context* 308-313. T Campbell *Poverty as a Violation of Human Rights: Inhumanity or Injustice?* (2003).

<sup>280</sup> B Andreassen & D Banik "Human rights and extreme poverty: African dimensions" (2010) 14(1) *The International Journal of Human Rights* 4, 9.

<sup>281</sup> Andreassen & Banik (2010) 14(1) *International Journal of Human Rights* 4, 9.

<sup>282</sup> Osmani *Evolving Views on Poverty* 21-22.

hunger, to be in good health, and to be educated.<sup>283</sup> In terms of rights, a poor person could be said to lack fulfilment of certain human rights for example, the rights to food, health, and education. These rights have constitutive relevance for poverty.

Instrumental relevance refers to the ability of certain rights to promote poverty reduction. Osmani refers to evaluative and causative relevance.<sup>284</sup> The idea of evaluative relevance stems from the observation that analyses of poverty require social evaluation through participation of the poor. The fulfilment of civil-political rights may be a necessary precondition for such an evaluation. Civil and political rights can also play an important causative role, for example in preventing the occurrence of famines through a relatively free media.<sup>285</sup>

Finally, rights can be relevant to poverty by acting as a constraint on the types of action that are permissible in order to address poverty. For example, the forced sterilisation of the poor population in order to control and diminish the effects of poverty, as violating people's personal liberty and right to choose. These rights may not in themselves be constitutive of poverty or instrumental to reducing poverty, but will still be relevant by ruling out certain types of action as not permissible.<sup>286</sup>

A human rights-based approach to poverty reduction provides the norms and values upon which to devise policies and strategies for poverty reduction, as set out in the international law of human rights. The rights-based approach to poverty is a normative framework based on international human rights law. In order to satisfy all the requirements of a rights-based approach to poverty, the process of policy formulation will also need to ensure the participation of stakeholders, and the progressive realisation of rights over time. Based on this international framing, in a South African democratic

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<sup>283</sup> Sen *Development as Freedom* 36-43. See also S Osmani "Poverty and Human Rights: Building on the Capability Approach" *Journal of Human Development and Capabilities: A Multi-Disciplinary Journal for People-Centered Development*, Vol 6(2) (2005) 205–219; and S Van Der Berg *A capabilities approach to the judicial review of resource allocation decisions impacting on socio-economic rights* LLD thesis University of Stellenbosch (2015).

<sup>284</sup> Osmani *Evolving Views on Poverty* 22.

<sup>285</sup> See A Sen *Poverty and Famines: An Essay on Entitlement and Deprivation* (1981).

<sup>286</sup> Osmani *Evolving Views on Poverty* 22.



developmental state, a rights-based approach to poverty reduction must thus also include the participation of those affected by poverty.

However, participation can only be genuine or meaningful if ordinary people are empowered to claim their rights and to participate effectively in the decision-making processes, either directly or through agents such as civil society organisations. This requires the expansion of civil and political rights to create an enabling environment for the advancement of the cause of poverty reduction. For example, if the poor are to genuinely enjoy the right to participate in the development of poverty reduction measures, they must be empowered through the fulfilment of the right of association,<sup>287</sup> the right of assembly,<sup>288</sup> the right to freedom of expression,<sup>289</sup> the right to information<sup>290</sup>

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<sup>287</sup> See UDHR Article 20; ICCPR Article 22; and ICESCR Article 8.

<sup>288</sup> See UDHR Article 20; and ICCPR Article 21.

<sup>289</sup> See UDHR Article 19; ICCPR Article 19; Human Rights Committee, General Comment No 10 “Freedom of opinion” (Art 19) (1983).

<sup>290</sup> In its very first session in 1946, the UN General Assembly adopted Resolution 59(I), stating, “Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.” Abid Hussain, the UN Special Rapporteur on Freedom of Opinion and Expression, elaborated on this in his 1995 Report to the UN Commission on Human Rights, stating: “Freedom will be bereft of all effectiveness if the people have no access to information. Access to information is basic to the democratic way of life.” These quotations highlight the importance of freedom of information at a number of different levels: in itself, for the fulfilment of all other rights and as underpinning democracy. The right to information is not recognised in the international bill of rights as a stand-alone right. The UDHR and the ICCPR enveloped freedom of information within the broader right to freedom of expression (Article 19). The “Johannesburg Principles on National Security, Freedom of Expression and Access to Information” U.N. Doc. E/CN.4/1996/39 (1996), were adopted on 1 October 1995 by a group of international law experts convened by ARTICLE 19, the International Centre Against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of the Witwatersrand, in Johannesburg, and elaborated upon the imperative that if people are to be able to monitor the conduct of their government and to participate fully in a democratic society, that they must have access to government-held information. See also the “Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters” June 25, 1998, 38 I.L.M. 517 (1999), *entered into force* Oct. 30, 2001. Over the past decade, freedom of information has also begun to be recognised in regional human rights instruments. See “Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa” adopted at the African Commission on Human and Peoples’ Rights, meeting at its 32nd Ordinary Session, in Banjul, The Gambia, from 17th to 23rd October 2002, which affirms the fundamental importance of freedom of expression and information as an individual human right based on Article 9 of the African Charter on Human and Peoples Rights <<http://www.achpr.org/sessions/32nd/resolutions/62/>> (accessed 26-07-2016). See also the “Council of Europe Convention on Access to Official Documents”, the first treaty on the right to know, adopted by the Council of Europe on 27 November 2008. This treaty was opened for signature on 18 June 2009 and 14 countries have signed thus far <<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/205>> (accessed 26-07-2016). The right to freedom of information is also enshrined in a number of national constitutions. <<http://www.Right2INFO.org>> (accessed 26-07-2016) brings together information on the legal frameworks for the right to information from more than 80 countries. See further M Dimba “Access to information as a tool for socio-economic justice” A presentation on behalf of the Open Democracy Advice Centre (ODAC) for the conference Towards Greater Transparency: Access to Information, 21 & 22 August 2012,



and the right of equal access to justice.<sup>291</sup> Empowerment is only possible through the fulfilment of these rights, and effective participation is then also achievable.<sup>292</sup> In a democratic developmental state, participation-enabling rights must be strongly protected and promoted in order to achieve progress in socio-economic transformation. In turn, one also requires social and economic rights in order to participate effectively – the familiar circularity problem with participation and socio-economic rights.

The Office of the United Nations High Commissioner for Human Rights ('OHCHR') has produced a number of documents over the past decade, detailing a normative approach, instead of a development economist's approach, to the concept and content of poverty. OHCHR produced *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*<sup>293</sup> ('OHCHR Guidelines') to guide countries, international agencies and development specialists in translating human rights norms, standards and principles into poverty reduction policies and strategies. The *OHCHR Guidelines* are based on the conceptual work of Professors Paul Hunt, Manfred Nowak and Siddiq Osmani,<sup>294</sup> discussed above, the literature on human rights, poverty and development in general, and consultations with UN member states, intergovernmental and nongovernmental organisations.<sup>295</sup>

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Windhoek, Namibia <<http://www.ippr.org.na/sites/default/files/ATI%20Socio-Economic%20Briefing%20Paper.pdf>> (accessed 03-07-2016).

<sup>291</sup> UDHR Article 7: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination." See also ICCPR Article 22; and Human Rights Committee, General Comment No 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007).

<sup>292</sup> Osmani *Evolving Views on Poverty* 23-24. See also Human Rights Committee, General Comment No 25 "The right to participate in public affairs, voting rights and the right of equal access to public service" (Art 25) (1996).

<sup>293</sup> Office of the United Nations High Commissioner for Human Rights *Human Rights and Poverty Reduction: A Conceptual Framework* (2004); and *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies* (2006), <<http://www.ohchr.org/Documents/Publications/PovertyReductionen.pdf>> (accessed 10-07-2016).

<sup>294</sup> See Osmani *Evolving Views on Poverty*; S Osmani "Human rights to food, health and education" (2000) 1(2) *Journal of Human Development* 273-98; *The Concept of Poverty in the Rights-based Approach* (2002); S Osmani, O Chowdhury, M Mujeri & Q Shahabuddin *Proposal for the Bangladesh Country Study: The Right to Development Project* (2002); P Hunt, M Novak & S Osmani *Human Rights and Poverty Reduction Strategies* UN OHCHR Discussion Paper (2002).

<sup>295</sup> For a sample of the literature on a human rights-based approach to poverty reduction, see R Kapindu "Poverty reduction strategies and the rights to health and housing: The Malawian and Ugandan experiences"

The *OHCHR Guidelines* underline the importance of participatory rights in the four stages of participation in poverty reduction policy development: “preference revelation; policy choice; implementation; and monitoring, assessment and accountability”.<sup>296</sup> “Preference revelation” is the initial stage before policies are formulated, where people must be enabled to state what their preferences are, and the objectives they want to achieve. “Policy choice” refers to when policies are developed and decisions are taken regarding the allocation of resources. Opportunities must also be created to empower the poor to participate in the implementation stage as well, primarily the responsibility of the executive arm of the State. Such opportunities mostly arise in community-level activities, within an institutional framework of representative local government. The final stage involves monitoring and assessment of the impact of policies and holding to account the State and other duty-bearers, for their obligations.

In a democratic developmental state these stages of participation in policy formulation would enable people to participate meaningfully in co-creating policies, programmes and laws of the country to ensure its socio-economic transformation, as well as monitoring and assessing their efficacy through participatory rights such as the right to information and freedom of expression. The *OHCHR Guidelines*’ description of the four stages of participation required, clearly lay out the opportunities for population groups that are affected directly and indirectly, to inform our understanding of the nature and genesis of poverty and then to adopt more appropriate and effective strategies to reduce poverty. Furthermore, the rights-based approach to poverty supports the interaction between

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*African Human Rights Law Journal* Vol 6 Issue 2 (2006) 493; C Nyamu-Musembi & A Cornwall *What is the ‘rights-based approach’ all about? Perspectives from international development agencies* Institute of Development Studies Working Paper (2004) 234; B Fortman *Persistent Poverty and Inequality in an Era of Globalization: Opportunities and Limitations of a Rights Approach* Tilburg University Lustrum Conference (2003); J Mubangizi “Know your rights: Exploring the connections between human rights and poverty reduction with specific reference to South Africa” (2005) 21(1) *SAJHR* 32; T Pogge “Recognised and violated by international law: The human rights of the global poor” *Leiden Journal of International Law* 18 (2005) 717; Q Wodon *Extreme Poverty and Human Rights* Background Paper for the World Development Report 2000/2001 World Bank; P Vizard *Conceptualising Poverty in a Human Rights Framework: Foundational Issues in Ethics, Economics and International Law* PhD Thesis, London School of Economics (2000); UNDP *Human Development and Human Rights* (1998); UNDP *Human Development Report* (2000); DFID *The UK White Paper on International Development* (1997); and Human Rights Watch *Indivisible Human Rights: The Relationship between Political and Civil Rights to Survival, Subsistence and Poverty* (1992).

<sup>296</sup> OHCHR *Guidelines* 14-15.

socio-economic rights and administrative justice by highlighting the need to ensure meaningful participation of the poor in policy and decision-making processes, as well as holding the State and other duty-bearers accountable.

The obligations deriving from these poverty-related rights may be analysed by reference to the duties to respect, protect and fulfil.<sup>297</sup> The duty to respect entails the duty-bearer not breaching the enjoyment of any human right, directly or indirectly. The duty to protect entails the duty-bearer preventing third parties from abusing the right. The duty to fulfil entails the duty-bearer adopting appropriate legislative, administrative and other measures to ensure the full realisation of rights.<sup>298</sup> A rights-based approach also calls for the creation and strengthening of the institutions responsible for holding duty-bearers accountable for their actions.<sup>299</sup> Accordingly, the rights-based approach to poverty reduction, in a democratic developmental state, emphasises obligations and requires that all duty-holders, including the legislature, the executive, the judiciary, administrations and organs of state, be held to account for their conduct in realising human rights.

All mechanisms of accountability must be accessible, transparent and effective.<sup>300</sup> An accountability procedure compels duty-bearers to answer for their acts or omissions in relation to their duties. It provides an opportunity for right-holders to understand how duty-bearers have discharged, or failed to discharge, their obligations. It then also provides duty-bearers with an opportunity to clarify or justify their conduct. Accountability includes some form of remedy and reparation for human rights violations.

<sup>297</sup> OHCHR *Conceptual Framework* 30; OHCHR *Guidelines* 11.

<sup>298</sup> These types of duties are derived from the work of Henry Shue in *Basic Rights: Subsistence, Affluence and US Foreign Policy* (1980); and *Basic Rights* 2ed (1996). See Committee on Economic, Social and Culture Rights General Comment 3, Article 2 Implementation at the national level (Thirteenth session, 1981), HRI/GEN/1/Rev.1 at 4 para 1; and the "The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights" (1998) 20 *Human Rights Quarterly* 691-701 para 6 (the 'Maastricht Guidelines'). These guidelines elaborate upon the understanding of violations of economic, social and cultural rights and remedies thereto. They built on "The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights" (1987) 9 *Human Rights Quarterly* 122-135. The African Commission on Human and Peoples' Rights adopted this typology of obligations in *The Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights v Nigeria*, communication no. 155/96 (2001) AHRLR 51 (ACHPR 2001) paras 44-48. For a critique of this typology, see Steiner, Alston & Goodman *International Human Rights in Context: Law, Politics, Morals* 185-192; and Liebenberg *Socio-Economic Rights* 82-87.

<sup>299</sup> OHCHR *Guidelines* 4.

<sup>300</sup> OHCHR *Guidelines* 4.

Individuals' whose rights have been violated also have a procedural right to an effective remedy before a domestic body. This does not necessarily require a judicial procedure. There are four broad types of accountability mechanisms: judicial; quasi-judicial (e.g. ombuds institutions, international human rights treaty-bodies); administrative tribunals; and political (e.g. parliamentary processes). States have an obligation to safeguard the rights of any person claiming a remedy, by having their rights determined by a competent judicial, administrative or legislative authority. Furthermore, States must ensure that relevant authorities enforce these remedies.<sup>301</sup> The interdependence between socio-economic rights and administrative justice in a democratic developmental state highlights the importance of accountability in the context of addressing poverty and inequality. Progress cannot be made if there are no mechanisms for transparency of decision-making and reparation for failure to realise socio-economic rights for the poor and marginalised.

The international human rights normative framework is particularly concerned with protecting individuals and groups who are vulnerable, marginal, disadvantaged or socially excluded and ensuring they have opportunities to participate in decisions affecting them.<sup>302</sup> The principles of equality and non-discrimination<sup>303</sup> require that laws and

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<sup>301</sup> See UN Committee on Economic, Social and Cultural Rights, General Comment No 9 (Nineteenth sess, 1998) "The domestic application of the Covenant" UN doc E/C.12/1998/24; and UN Committee on Economic, Social and Cultural Rights, General Comment 3. See also the jurisprudence of the European Convention on Human Rights pertaining to article 6 of the Convention. Article 6 protects the right to a fair criminal and civil trial and the procedural protections in article 6 have been applied to social security benefits. See for example *Feldbrugge v Netherlands* (1986) 8 EHRR 425 (contributory sickness benefit claim); *Schuler-Zgraggen v Switzerland* (1993) 16 EHRR 405; *Salesi v Italy* (1993) 26 EHRR 187 (state-funded non-contributory disability pension); *Kerojavi v Finland* (1996) EHRLR 66; *Mennitto v Italy* (2000) 34 EHRR 1122; and the discussion by M Scheinin 'Economic and social rights as legal rights' in A Eide, C Krause & A Rosas (eds) *Economic, Social and Cultural Rights: A Textbook* 2 ed (2001) 29, 34–38.

<sup>302</sup> See the Convention on the Elimination of All Forms of Racial Discrimination (1969) and the Convention on the Elimination of All Forms of Discrimination against Women (1981). There are also numerous international instruments protecting the status of refugees, protecting minorities, children, persons with disabilities, older persons etc. See also Human Rights Committee, General Comment No 28 "Equality of rights between men and women" (2000); UN Committee on Economic, Social and Cultural Rights, General Comment 16 "The equal right of men and women to the enjoyment of all economic, social and cultural rights" (Article 3) (Thirty-fourth session, 2005), U.N. Doc. E/C.12/2005/3 (2005); and UN Committee on Economic, Social and Cultural Rights, General Comment No 20.

<sup>303</sup> The principle of non-discrimination and equality are well established in international human rights law. See the UDHR Article 1: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood;" and Article 2 "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as

institutions that cultivate discrimination against specific individuals and groups must be eliminated.<sup>304</sup>

The obligation on duty-holders to work towards poverty reduction, does not require that all human rights must be realised immediately. In recognition of resource constraints, it allows, if necessary, for progressive realisation of rights over a period of time.<sup>305</sup> At the same time, however, the approach demands that minimum essential levels of all rights – or core obligations – should always be respected.<sup>306</sup> Progressive realisation of socio-economic rights is a key feature of the South African Bill of Rights, however, our judiciary has largely rejected the international minimum core approach. This jurisprudence will be discussed in detail in chapter four in the context of a democratic developmental state that seeks socio-economic transformation, in particular for people living in poverty and suffering extreme poverty.

In conclusion, the international human rights and development discourse has highlighted the conceptual and operational linkages that exist between human rights, development and poverty. There is increasing global support for attempts to redefine development issues, including poverty, as a normative conception grounded in the human rights doctrine. The normative framework of a human rights-based approach to poverty reduction is extremely valuable to the development discourse in a democratic developmental state. The case for a human rights-based approach to poverty focuses precisely on the transformative quality of human rights and their legal obligations. Human rights also mobilise communities and groups, as an essential mechanism for social movements, popular involvement and social change. Human rights standards, in

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race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status...” Similarly ICESCR, Articles 3, 7; and ICCPR, Article 26. See also UN Committee on Economic, Social and Cultural Rights, General Comment No 20 “Non-Discrimination in Economic, Social and Cultural Rights” (Art 2, para. 2) (2009).

<sup>304</sup> *OHCHR Guidelines* 17.

<sup>305</sup> *OHCHR Guidelines* 22-26. See UN Committee on Economic, Social and Cultural Rights on the interpretation of “progressive realisation” in General Comment No 3. See also *Maastricht Guidelines on Economic, Social and Cultural Rights* para 8.

<sup>306</sup> *OHCHR Guidelines* 26-27. For purposes of interpreting States Parties’ obligations under the ICESCR, see UN Committee on Economic, Social and Cultural Rights, General Comment No 3 para 10. See also General Comments No 12 (right to adequate food), No 13 (right to education) and No 14 (right to health) as examples of minimum core obligations.

this way, provide evaluative norms and potentially empowering tools to address the neglect of weak or vulnerable groups in development processes.<sup>307</sup> This is even more so in a South African democratic developmental state, where there is a thriving media and civil society holding up the values of participation and accountability.

### 3.6 Conclusion

This chapter serves as the contextual background to the analysis of socio-economic rights and administrative justice jurisprudence in the chapters that follow. I described the dire situation of poverty and inequality in South Africa inherited from the apartheid era, and which in many respects still exists, albeit substantially improved upon, in the twenty-two years since the advent of constitutional democracy.

The understanding of poverty globally has evolved from a narrowly defined income-based notion of what it means to be poor, to a holistic interpretation of what is required in order to lift people from poverty and free human potential. This evolved conceptualisation incorporates elements of material deprivation that must be overcome through the provision of basic needs, and, significantly for the purposes of this study, incorporates the less tangible elements of agency, empowerment and capabilities required to surmount the impact of deprivation on the socio-political dimensions of life.

I have provided an overview of the multi-dimensionality of poverty from a development economics perspective, and have linked it to a holistic human rights-based approach to poverty. This multi-layered description of poverty and related rights further depicts the needs of individuals and communities as encompassing the tangible and material domains on the one hand as well as the intangible sense of having control over one's life described by Sen as "capability functionings".

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<sup>307</sup> See discussions of the use of rights discourse in advocating for policy and law changes by non-governmental organisations in: S Wilson "Taming the Constitution: Rights and reform in the South African education system" 20 (2004) *SAJHR* 418; M Heywood "Preventing mother-to-child HIV transmission in South Africa: Background, strategies and outcomes of the Treatment Action Campaign Case against the Minister of Health" (2003) 19 *SAJHR* 278; M Heywood "Shaping, making and breaking the law in the campaign for a National HIV/AIDS Treatment Plan" in P Jones & K Stokke (eds) *Democratising Development: The Politics of Socio-Economic Rights in South Africa* (2005) 181.



The international human rights legal framework supports a multi-dimensional view of poverty. A rights-based approach to poverty sees socio-economic rights such as the right to health, education, housing, water and social security as related to the material deprivations that people experience. Civil and political rights facilitate poor people's empowerment and participation in the decisions that affect them. Both categories of rights are critical and mutually supportive in the context of poverty. These rights are then translated into obligations on state actors to ensure the reduction of poverty. Those actors responsible for designing and implementing the measures required to reduce poverty in all its dimensions, must do so cooperatively, in terms of the Constitution, and based on the principles of participatory democracy. These principles require the participation of the poor in the policy, legislative and administrative decisions that affect them.

The South African Constitution, in a democratic developmental state, obliges the provision of material benefits as well as participatory empowerment, for true emancipation from poverty for the poor. In chapters four, five and six, I will analyse the shortcomings and successes of the interwoven jurisprudence on socio-economic rights and administrative justice, in relation to poverty reduction in the context of a South African democratic developmental state. I will identify key interdependent features of each set of rights, which can potentially enhance the future jurisprudence on poverty reduction. I will focus on the rights to education, social security, water, and housing and basic services, where the interconnectedness of socio-economic rights and administrative justice in the context of poverty is most vivid. I will examine the interaction and complementarity between the right to administrative justice and socio-economic rights in addressing poverty in the following chapters, based on the conceptual foundations in chapters two and three.

## CHAPTER 4: Socio-Economic Rights to Address Poverty

### 4.1 Introduction

The incorporation of justiciable socio-economic rights in the 1996 Constitution was an acknowledgement of the need to transform the situation in South African society, where many people live in desperate poverty. Poverty has been recognised in terms of lack of access to quality education, income, food, health care, housing, water and land. Although it only ratified the International Covenant on Economic, Social and Cultural Rights on the 12<sup>th</sup> of January 2015, South Africa is a model in the international community, for including enforceable socio-economic rights in the Bill of Rights.<sup>308</sup> The South African Courts have developed an influential body of jurisprudence on socio-economic rights in the context of addressing poverty and inequality. Since 1996, over a period of 21 years, the Constitutional Court has handed down 52 judgements related to a number of socio-economic rights, namely the rights to property (6), housing/shelter (28), water (1), social security (5), health (3), education (8) and access to medical treatment for prisoners (1).<sup>309</sup>

Sen's capability definition of poverty and the international, multi-dimensional human rights approach to poverty discussed in chapter three, has located the elements of empowerment and participation of the poor, alongside their socio-economic needs. The

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<sup>308</sup> The South African government initially signed the ICESCR in 1994. It took twenty years for the government to ratify the covenant and it finally entered into force on 12 April 2015. Section 27, the Legal Resources Centre (LRC) and other organisations welcomed the ratification but raised concerns about the qualification made in respect of the right to education. The qualification states: "The Government of the Republic of South will give progressive effect to the right to education, as provided for in Article 13 (2)(a) and Article 14, within the framework of its National Education Policy and available resources." The South African Constitution and jurisprudence of the South African Constitutional Court state that the right to education is immediately realisable, unlike the other socio-economic rights in the SA Constitution that are "progressively realisable". The Socio-Economic Rights Institute (SERI) in a press statement after the ratification, expressed hope that the SA government would now also ratify or accede to the Optional Protocol to the ICESCR (OP-ICESCR), which provides an individual complaint mechanism (such as exists for the other major international human rights treaties, including the International Covenant on Civil and Political Rights). This mechanism allows poor and marginalised people to lodge individual complaints regarding socio-economic rights violations at the international level, thereby promoting a culture of accountability for implementing the ICESCR. <[http://www.seri-sa.org/images/ICESR\\_CN\\_23\\_2015-Eng.pdf](http://www.seri-sa.org/images/ICESR_CN_23_2015-Eng.pdf)> (accessed 01-09-2016).

<sup>309</sup> See the Appendix to this dissertation for the full list of socio-economic rights cases.



interpretation of socio-economic rights in the South African jurisprudence has evolved to incorporate participatory elements in the procedural dimensions of socio-economic rights, as well as in the remedies directed by the courts, such as meaningful engagement. There is a burgeoning literature and jurisprudence on the significance of participation and active agency in transforming South African society to an empowered nation of people that are able to take up opportunities provided by the state, society and the markets. This is explicit in the notion of a *democratic* developmental state where participatory democracy flourishes.

Much of the debate around the justiciability of socio-economic rights has involved the appropriate role of the judiciary in a constitutional democracy.<sup>310</sup> The Constitutional Court's approach has been one of deference to democratic prerogatives and the limited nature of public resources, while also paying special deliberative attention to those whose basic needs are not being met. The Court's transformative role and jurisprudence has large implications for how we think about participation, empowerment and meeting social and economic needs in a democratic developmental state.

The Court's approach has been likened to an administrative law model of socio-economic rights. What the Court has implicitly required is for government to develop and fund social programmes through which a significant number of poor people are progressively given access to socio-economic rights. What the Court calls for is a reasonable plan, designed to ensure that relief will be forthcoming. The Court has - tentatively at first but more boldly of late - sought to include elements of participatory democracy by increasingly requiring government to define programmes and plans together with

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<sup>310</sup> See D Davis "Adjudicating the Socio-Economic Rights in the South African Constitution: Towards 'Deference Light'" 22 *SAJHR* 301 (2006); K Young "A typology of economic and social rights adjudication: Exploring the catalytic function of judicial review" *ICON* (2010) Vol 8 No 3 385-420; D Brand "Judicial Deference and Democracy in Socio-Economic Rights Cases in South Africa" (2011) *Stellenbosch Law Review* 614; B Ray "Evictions, Aspirations and Avoidance" V (2014) *CCR* 173; K Young "The Avoidance of Substance in Constitutional Rights" V (2014) *CCR* 233; D Landau "Aggressive Weak-Form Remedies" V (2014) *CCR* 244; J Dugard "Beyond Blue Moonlight: The Implications of Judicial Avoidance in Relation to the Provision of Alternative Housing" V (2014) *CCR* 265; B Ray *Engaging with Social Rights: Procedure, Participation, and Democracy in South Africa's Second Wave* (2016).

affected individuals and communities.<sup>311</sup> This has almost exclusively been applied in the context of evictions law and education cases, which are not limited by “progressive realisation” and “available resources”, and is not yet a generalised requirement for all socio-economic rights. However, the potential for extrapolation to other socio-economic rights exists. The Court, in conjunction with technical experts, lawyers and affected communities, can determine the substantive content of socio-economic rights and what is required to alleviate the plight of those living in poverty. This can be done in such a way as to alleviate poverty for individual litigants as well as address wider systemic developmental issues.

This chapter explores the socio-economic rights jurisprudence of the South African Courts and its pursuance of poverty alleviation, in the context of a democratic developmental state. I first examine the substantive, proactive and participatory role of judicial interpretation and enforcement of socio-economic rights. I then analyse elements of the South African socio-economic rights jurisprudence that support a participatory, experimental, managerial and developmental approach: reasonableness review; substantive interpretation; and meaningful engagement remedies and their enforcement. These themes will be further discussed in chapters five and six in relation to their interface with the right to just administrative action, in the context of a democratic developmental state.

Although development can be said to be a strategic priority for all governments, the developmental role of governments in lesser-developed or transitional states, like South Africa, is different from that of governments in more developed states.<sup>312</sup> In chapter two I traced the origins of so-called developmental states, summarising the various manifestations of the developmental state on different continents. I then identified the characteristics of the contemporary South African democratic developmental state. In adopting the philosophy of a democratic developmental state, the promotion of economic

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<sup>311</sup> See the typology of socio-economic rights adjudication described in Young (2010) *ICON* 385-420, in particular the experimentalist review and managerial review.

<sup>312</sup> See D Landau “Political Institutions and Judicial Role in Comparative Constitutional Law” (2010) *Harvard International Law Journal* Vol 51(2).

development is closely aligned to the goals of achieving substantial reduction in poverty and inequality. As distinct from a traditional developmental state, this requires a social safety net implemented by an efficient and effective bureaucracy, autonomous institutions and a participatory, deliberative and representative democracy.<sup>313</sup>

This chapter evaluates the Court's performance in reviewing socio-economic rights in the context of a democratic developmental state, and reconsiders the Courts' role in the transformative project. Based on a contemporary understanding of the multi-dimensionality of poverty, giving socio-economic rights substantive content and stimulating participation is critical to achieving real and lasting poverty reduction on a systemic scale. Robust review by the courts in socio-economic rights cases is far preferable to deferential review since the courts have an equally substantive role to play as the legislature and executive, in advancing the democratic developmental state.<sup>314</sup> A stronger form of review allows scope for government, community and civil society participation in the translation of rights into effective policies and programmes, both as a means and an end to achieving long-term socio-economic transformation.

## 4 2 International law on social and economic rights

Socio-economic rights are recognised in the *Universal Declaration of Human Rights* (1948) as well as a wide range of international, regional and specialised human rights conventions.<sup>315</sup> The key international treaty protecting economic and social rights is the *International Covenant on Economic, Social and Cultural Rights* (1966) ('ICESCR').<sup>316</sup> In addition, regionally social and economic rights are also protected in the *African Charter on Human and People's Rights* (1981).<sup>317</sup> Under international law, it is now widely recognised that the realisation of all human rights generally entails the following

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<sup>313</sup> F Cloete & M Auriacombe *Measuring Empowerment in Democratic Developmental States* Centre for International Policy Exchanges, School of Public Policy, University of Maryland 1 <[http://umdcipe.org/conferences/Moscow/papers/Measuring\\_Empowerment\\_in\\_Democratic\\_Developmental\\_States.pdf](http://umdcipe.org/conferences/Moscow/papers/Measuring_Empowerment_in_Democratic_Developmental_States.pdf)> (accessed 30-09-2016).

<sup>314</sup> See discussion below in 4 3, 4 4 and 4 5.

<sup>315</sup> Universal Declaration of Human Rights, UN Gen Ass Res 217A (III), 10 December 1948 .

<sup>316</sup> The International Covenant on Economic, Social and Cultural Rights (1966) 999 UNTS 3 was adopted on 16 December 1966, and entered into force on 3 January 1976.

<sup>317</sup> African Charter on Human and People's Rights (1981) 21 ILM 59 (entered into force on 21 October 1986).

elements: respect, protection and fulfilment.<sup>318</sup> This was reiterated with respect to socio-economic rights in the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* ('Maastricht Guidelines')<sup>319</sup> and in the comments of the UN Committee on Economic, Social and Cultural Rights.<sup>320</sup>

The duty to respect includes primarily negative duties and means that the state has to consider in all its actions the effect on human rights and must not engage in acts whose outcome would be the deprivation or restriction of access to socio-economic rights. It is generally accepted that duties to respect are immediate obligations irrespective of whether socio-economic rights or civil and political rights are involved. This can be explained by the fact that these obligations only require abstention and limited or no resources. The duty to protect requires states to take steps, in particular legislative measures, to prevent third parties from infringing human rights. With respect to socio-economic rights, this obligation means above all the protection of people from third parties depriving them of resources, which would otherwise enable them to satisfy their basic needs. The growing relevance of private role-players, especially multi-national corporations, renders this duty increasingly important.<sup>321</sup> Finally, the duty to fulfil

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<sup>318</sup> H Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy* (1980).

<sup>319</sup> See "The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights" (1998) 20 *Human Rights Quarterly* 691-701 para 6 (the 'Maastricht Guidelines'). The Maastricht Guidelines are considered to be 'soft law' under international law and hence are non-binding. They were developed on the occasion of the 10th anniversary of *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* UN doc E/CN4/1987/17Annex (1987), reprinted in (1987) 9 *Human Rights Quarterly* 122 (the 'Limburg Principles'), by a group of more than thirty experts. The experts met in Maastricht, the Netherlands, from 22-26 January 1997 at the invitation of the International Commission of Jurists (Geneva, Switzerland), the Urban Morgan Institute on Human Rights (Cincinnati, Ohio, USA) and the Centre for Human Rights of the Faculty of Law of Maastricht University (the Netherlands). The meeting was convened to elaborate on the Limburg Principles as regards the nature and scope of violations of economic, social and cultural rights and appropriate responses and remedies. The participants unanimously agreed on the Maastricht Guidelines as a reflection of the evolution of international law since 1986. These guidelines are designed to be of use to all who are concerned with understanding and determining violations of economic, social and cultural rights and in providing remedies thereto, in particular monitoring and adjudicating bodies at the national, regional and international levels.

<sup>320</sup> See Committee on Economic, Social and Cultural Rights, General Comment 3, The nature of States parties' obligations (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1990), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 14 (2003).

<sup>321</sup> For example, see the discussion on the role of multinational corporations and their accountability for actions in domestic and international economies that impact negatively on the human rights of the poor and the environment, in P Alston & R Goodman *International Human Rights* (2013) 1462-1496; and T Pogge

requires states to take appropriate positive steps towards the full realisation of the right. This duty is of crucial importance for the realisation of socio-economic rights. This duty, involving questions of resource restrictions and wealth redistribution, is also one of the main elements of the ongoing debate around socio-economic rights. The duties to protect and fulfil socio-economic rights take on greater significance in the context of a democratic developmental state like South Africa, as it seeks to address widespread poverty and inequality in a transformative and systemic manner.

Another classification of obligations distinguishes between obligations of conduct and obligations of result.<sup>322</sup> Whereas the former only require a certain policy or specific measures, the latter require the achievement of specified targets. There is a close relationship between obligations of conduct and result and the obligations to respect, protect and fulfil since the latter can all include, and be expressed by duties of conduct and of result. The duty to fulfil the right to health could therefore either be articulated in the form of a required conduct, for example establishing a comprehensive programme for the supply of basic health care to all children; or it could be set up as an obligation of result such as the reduction of infant mortality by a certain percentage.<sup>323</sup> Both obligations of conduct and of result have a role to play for different purposes.

Modern constitutions are increasingly recognising that human rights and the basic social conditions in which people live, are fundamentally interconnected, by incorporating socio-economic rights.<sup>324</sup> These are seen to impose “positive rights” or obligations on the state as well as “negative rights” (which impose a duty on the government not to act in certain ways, such as freedom from torture or discrimination). Apart from simply

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“Recognized and violated by international law: The human rights of the global poor” (2005) 18 *Leiden Journal of International Law* 717.

<sup>322</sup> The Maastricht Guidelines para 7.

<sup>323</sup> See chapter three.

<sup>324</sup> See generally M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) for a critical analysis of social rights in twenty-nine national and international jurisdictions. Constitutions with explicit socio-economic rights provisions that may be judicially enforced are mainly found in Central and Eastern Europe, and South America. See for example the Colombian Constitution, the Lithuanian Constitution, the Hungarian Constitution, the Sri Lankan Constitution and the Constitution of the Democratic Republic of East Timor 2002. For the incorporation specifically of children’s socio-economic rights in modern constitutions, see generally J Tobin “Increasingly seen and heard: The constitutional recognition of children’s rights” (2005) 21 *SAJHR* 86.

protecting members of society from the heavy hand of state power, socio-economic rights oblige the state to do as much as it can to secure for all members of society a basic set of social goods – education, social security, health care, food, water, shelter, access to land and housing.

Article 2(1) of the ICESCR describes the kind of measures a state has to take in fulfilment of its obligations in regard to socio-economic rights. Article 2 consists of five elements: a) a state has to “undertake steps”; b) “individually and through international assistance and cooperation”; c) “to the maximum of its available resources”; d) “with a view to achieving the full realisation of the right”; and e) “by all appropriate means”. With regard to appropriate means, the ICESCR mentions “particularly the adoption of legislative measures”. The Committee on Economic Social and Cultural Rights (‘CESCR’) stated in General Comment 3 that “appropriate means” should be interpreted widely and would include, but not be limited to judicial remedies as well as administrative, financial, educational and social measures.<sup>325</sup> Relating to judicial remedies, it is noteworthy that the CESCR expressly emphasised the justiciability of the rights in the Covenant and considers judicial remedies to be a highly appropriate measure.<sup>326</sup>

Section 39(1)(b) of the Constitution states that, when interpreting the Bill of Rights, a court “must consider international law”. This means that when interpreting human rights norms, the courts must take cognisance of international and comparative law in furthering its transformative ideals.<sup>327</sup> The Constitutional Court has held that both binding and non-binding international law may be relevant.<sup>328</sup> Non-binding law may include treaties, which South Africa has not ratified, those that it may not ratify,<sup>329</sup> as well

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<sup>325</sup> CESCR General Comment 3 paras 5 and 7.

<sup>326</sup> CESCR General Comment 3 paras 5 and 7. See also Committee on Economic, Social and Cultural Rights, General Comment 9, The domestic application of the Covenant (Nineteenth session, 1998), U.N. Doc. E/C.12/1998/24 (1998) reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 54 (2003), stressing domestic incorporation and judicial enforcement in giving effect to the obligations in the ICESCR.

<sup>327</sup> Liebenberg *Socio-Economic Rights* 101-105. See *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC).

<sup>328</sup> *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) para 35 (‘*Makwanyane*’).

<sup>329</sup> For example the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

as soft international law.<sup>330</sup> Binding international law includes primarily treaties that South Africa has ratified, as well as norms of customary international law.<sup>331</sup> As Liebenberg states, the Court has “adopted a flexible approach” to the application of international law when interpreting the Bill of Rights, in relation to non-binding law.<sup>332</sup> However, the Court is obliged to follow binding international law that has been enacted into domestic law through the provisions of sections 231 and 232 of the Constitution. Section 231(4) provides that a self-executing provision of an agreement that has been approved by Parliament is law in South Africa unless inconsistent with the Constitution or any piece of legislation.<sup>333</sup>

Finally, section 233 of the Constitution requires the courts when interpreting any piece of legislation to “prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law”. This would apply equally to legislation affecting people’s socio-economic rights. As will be evident from the discussion of the socio-economic rights jurisprudence in the South African Courts, the interpretive imperative in section 233 has not been fully appreciated. However, now that the South African Government has ratified the ICESCR, we will hopefully see more infusion of international interpretation in the substance of socio-economic rights.<sup>334</sup>

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<sup>330</sup> “Soft” international law refers to interpretive material, for example the General Comments to the ICESCR, resolutions of international conferences, reports and guidelines issued by international bodies. See *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) para 35.

<sup>331</sup> Customary international law refers to sources of law that are as ‘a general practice accepted as law’ as per art 38(1) of the Statute of the International Court of Justice. A rule of customary international law generally binds all states. See further discussion on human rights as customary international law in Alston & Goodman *International Human Rights* 61-89.

<sup>332</sup> See for example the discussion on the rejection by the Court of the concept of the minimum core of socio-economic rights in section 4.5.6 below.

<sup>333</sup> See discussion of self-executing treaty provisions in CESCR General Comment 9 para 11; J Dugard “South Africa” in D Sloss (ed) *The role of domestic courts in treaty enforcement* (2009) 455; and Liebenberg *Socio-Economic Rights* 103-104.

<sup>334</sup> The Optional Protocol to the ICESCR opened for signature in September 2009. It provides a mechanism for complaints to be brought to the Committee on Economic Social and Cultural Rights, against states that have ratified the Option Protocol. Available at <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCESCR.aspx>> (accessed 02-09-2016). South Africa has ratified the ICESCR but not the Optional Protocol.



### 4.3 Adjudicating socio-economic rights in a democratic developmental state

The socio-economic rights cases decided by the Constitutional Court to date have largely involved poor litigants attempting to access the various socio-economic rights protected in the Constitution.<sup>335</sup> Jackie Dugard and Stuart Wilson divide the cases into two phases, which is useful for purposes of analysis: the first wave of cases appearing before the Constitutional Court between 1995 and 2005 (8 in 10 years), and after a lull, the second wave from 2008 onwards.<sup>336</sup> The more recent cases between 2011 and 2017 have largely comprised of participatory judgments in evictions<sup>337</sup> and education<sup>338</sup> cases.

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<sup>335</sup> See D Brand and C Heyns “Introduction to socio-economic rights in the South African Constitution” in *Law, Democracy and Development* 1998(2) 153-167. See also K Maclean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009) 17-21 for an analysis of what is included in the categorisation of socio-economic rights in the South African Constitution. Socio-economic rights provisions are contained in sections 25(5), 26, 27, 28 and 29 of the Constitution. Section 25(5) provides that “the State must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.” Sections 26(1) entrenches the right of “everyone” “to have access to adequate housing”, and section 27(1) the right of everyone “to have access to (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance”. “Everyone” includes non-citizens such as permanent residents, as decided in *Khosa & Mahlaule* paras 46-47. The rights in sections 26 and 27 are qualified by a second subsection, which requires the state to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights”. In addition, these rights are subject to the general limitations clause in section 36. A second category of socio-economic rights, referred to as “basic” rights, entrenches children’s socio-economic rights, namely basic nutrition, shelter, basic health care services and social services (s 28(1)(c)); the right of everyone to basic education, including adult basic education and the right to receive education in the language of one’s choice (s 29(1)(a) and (b)); and detainee’s rights to adequate accommodation, nutrition, reading material and medical treatment (s 35(2)(e)). This category of rights is not qualified by reference to reasonable measures, progressive realisation or resource constraints. However, these rights are still subject to the limitations clause section 36. All of these rights are enforceable by the Courts, and the Courts have a wide discretion to grant “just and equitable” remedies (s 172). See I Currie & J De Waal “Socio-Economic Rights” in *Bill of Rights Handbook* 6 ed (2013) 563; and Liebenberg *Socio-Economic Rights*.

<sup>336</sup> M Langford, B Cousins, J Dugard, and T Madlingozi (eds) *Strategies for Socio-Economic Rights in South Africa: Symbols or Substance* (2013). See also generally Ray *Engaging with Social Rights*.

<sup>337</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) BCLR 150 (CC); *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (5) BCLR 449 (CC); *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 (4) BCLR 388 (CC); *Occupiers of Portion R25 of the Farm Mooiplaats 355JR v Golden Thread Limited* 2012 (4) BCLR 372 (CC); *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd* 2012 (4) BCLR 382 (CC); *The Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality* 2012 (9) BCLR 951 (CC); *Schubart Park Residents’ Association and Others v City of Tshwane* 2013 (1) BCLR 68 (CC); *Motswagae and Others v Rustenburg Local Municipality* 2013 (3) BCLR 271 (CC); *Hattingh v Juta* 2013 (5) BCLR 509 (CC); *Zulu v eThekweni Municipality* 2014 (8) BCLR 971 (CC); *Malan v City of Cape Town* 2014 (11) BCLR 1265 (C); *MC Denneboom Service Station CC v Phayane* 2014 (12) BCLR 1421 (CC); *Ngaka Modiri Molema District Municipality v Chairperson, North West Provincial Executive Committee* 2015 (1) BCLR 72 (CC); *Pheko v Ekurhuleni Metropolitan Municipality* 2015 (6) BCLR 711 (CC); *Pitje v Shibambo* 2016 (4) BCLR 460 (CC); *Molusi v Voges N.O.* 2016 (7) BCLR 839 (CC);

The first wave was gradual and though somewhat deferential, it provided considerable potential to further develop the jurisprudence in allowing access to material benefits for those living in poor and deprived circumstances.<sup>339</sup> It can be characterised by the Court's "reasonableness" approach to the review of the positive obligations imposed by socio-economic rights and largely by a lack of development of the substance of rights.<sup>340</sup>

The second wave of cases hit the Court in rapid succession between 2008 and 2010, followed by a spate of eviction cases in 2011 and 2012. This second wave of cases displays the Court's continued non-engagement with the substantive content of socio-economic rights and what Danie Brand described as "the proceduralisation of socio-economic rights" in relation to the first wave,<sup>341</sup> whilst at the same time enhancing the participatory elements of socio-economic rights through "meaningful engagement".<sup>342</sup>

Brian Ray's analysis of the second wave cases perceives the largely procedural approach of the courts and avoidance of substantive interpretation as a way of reframing social rights as "tools for democratic accountability in policy development rather than substantive

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*Pheko v Ekurhuleni Metropolitan Municipality (No 3) 2016 (10) BCLR 1308 (CC); Occupiers of Erven 87 and 88 Berea v De Wet (CCT108/16) [2017] ZACC 18 (8 June 2017).*

<sup>338</sup> *Governing Body of the Juma Masjid Primary School v Ahmed Asruff Essay NO 2011 (8) BCLR 761; KwaZulu-Natal Joint Liaison Committee v Member of the Executive Council, Department of Education, KwaZulu-Natal 2013 (6) BCLR 615 (CC); Head of Department, Department of Education, Free State Province v Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School 2013 (9) BCLR 989 (CC); MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others 2013 (12) BCLR 1365 (CC); Federation of Governing Bodies for South African Schools v Member of the Executive Council for Education, Gauteng 2016 (8) BCLR 1050 (CC).*

<sup>339</sup> Langford et al *Strategies for Socio-Economic Rights in SA*. See also D Brand "Judicial Deference and Democracy in Socio-Economic Rights Cases in South Africa" (2011) *Stellenbosch Law Review* 614; and Young (2010) *ICON* 392-95.

<sup>340</sup> See for example: C Scott & P Alston "Adjudicating constitutional priorities in a transnational context: A comment on Soobramoney's legacy and Grootboom's promise" (2000) 16 *SAJHR* 206; D Brand "The proceduralisation of South African socio-economic rights jurisprudence or 'What are socio-economic rights for?'" in H Botha, A J van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2004) 33; Pieterse (2004) *SAJHR*; C Steinberg "Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence" (2006) 123 *SALJ* 264; D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007); L Williams "Issues and challenges in addressing poverty and legal rights: A comparative United States/South African analysis" (2005) 21 *SAJHR* 436; J Dugard "Courts and the poor in South Africa: A critique of systemic judicial failures to advance transformative justice" (2008) 24 *SAJHR* 214; Currie & De Waal "Socio-Economic Rights" in *Bill of Rights Handbook* 563; and Liebenberg *Socio-Economic Rights* Chapters 4, 5, 6, 7 and 8.

<sup>341</sup> Brand "What are socio-economic rights for?" *Rights and Democracy*.

<sup>342</sup> See section 4.6 below.

guarantees”.<sup>343</sup> He supports this approach, which he describes as the eviction model and democratic engagement models, as being a way for the courts to exert stronger authority to enforce social rights whilst working within the constraints of the separation of powers.<sup>344</sup>

Katharine Young describes the role of the Court over the past two decades as “catalysing” government and other civil society role players to develop the substance of socio-economic rights.<sup>345</sup> She puts forward a typology of socio-economic rights adjudication as a differentiated analysis of the “catalytic court’s” interpretation of rights, its evaluation of government action and the design of remedies. The typology comprises a “deferential review” observed in the early cases;<sup>346</sup> a “conversational review” between courts and the legislature;<sup>347</sup> an “experimentalist review” involving numerous stakeholders engaging in contextual investigation and systemic change;<sup>348</sup> a “managerial review” where the court is directly responsible for prescribing the content of socio-economic rights and supervising relief;<sup>349</sup> and a “peremptory review” with the courts providing a superior response.<sup>350</sup> These various characterisations are helpful for devising a more nuanced and contextual understanding of the court’s evolving and vital transformative role. For the purposes of this dissertation I will primarily explore the experimentalist and managerial styles of review. These styles of review have the most potential to enhance and strengthen the role

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<sup>343</sup> Ray *Social Rights* 187.

<sup>344</sup> Ray *Social Rights* 233-328.

<sup>345</sup> See the typology of socio-economic rights adjudication and the notion of the “catalytic function” of the court described in Young (2010) *ICON* 385-420.

<sup>346</sup> Young (2010) *ICON* 392-395. See *Soobramoney v Minister of Health (KwaZulu-Natal)* 1997 (12) BCLR 1696 (CC); *Government of the RSA v Grootboom* 2000 (11) BCLR 1169 (CC); *Mazibuko v City of Johannesburg* 2010 (3) BCLR 239 (CC).

<sup>347</sup> Young (2010) *ICON* 395-398. See *Government of the RSA v Grootboom* 2000 (11) BCLR 1169 (CC); *Minister of Health v Treatment Action Campaign (No 2)* 2002 (10) BCLR 1033 (CC) 2002 (5).

<sup>348</sup> Young (2010) *ICON* 398-401. See *Minister of Health v Treatment Action Campaign (No 2)* 2002 (10) BCLR 1033 (CC) 2002 (5); *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC); *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (5) BCLR 475 (CC).

<sup>349</sup> Young (2010) *ICON* 402-407. See *Grootboom v Oostenberg Municipality* 2000 (3) BCLR 277 (C); *Minister of Health v Treatment Action Campaign (No 2)* 2002 (10) BCLR 1033 (CC) 2002 (5); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 (9) BCLR 847 (CC); *Mazibuko v City of Johannesburg and Others (Centre on Housing Rights and Evictions as amicus curiae)* (2008) 4 All SA 471 (W).

<sup>350</sup> Young (2010) *ICON* 407-409. See *Khosa v Minister of Social Development*; *Mahlaule v Minister of Social Development* 2004 (6) BCLR 569 (CC).

of the courts in the socio-economic rights jurisprudence and systemically address multi-dimensional poverty in a democratic developmental state.

In an assessment of the extent to which the Constitutional Court of South Africa can be said to have provided an “institutional voice for the poor” during the first wave of socio-economic rights cases from 1995 to 2005, Jackie Dugard and Theunis Roux<sup>351</sup> argued that although the Court found in favour of the applicants in four of the socio-economic rights cases that came before the Court during this period, the jurisprudence is lacking from a pro-poor perspective. The authors argue that firstly, none of the judgments provided direct, substantive relief to the applicants: “an outcome that gives little incentive to poor litigants to seek relief through constitutional litigation”.<sup>352</sup> Furthermore, the standard of review adopted by the Court – that the overall policy, legislation and practices of government in the sector concerned should be reasonable – “requires litigants to have a sophisticated understanding of often complex policy and budgetary issues, thereby disincentivising the poor from bringing cases to the Court, unless they have substantial legal and other expert support”.<sup>353</sup>

The second wave of socio-economic rights cases that have come before the Constitutional Court since 2008 have been brought by poor litigants seeking to enforce their rights. In the majority of these cases, the poor litigants succeeded in getting a favourable outcome in the Constitutional Court, but through procedural and participatory orders primarily for the benefit of litigants, rather than the substantive interpretation and realisation of rights towards long-term, systemic change. It is this trend that began with judicial deference in *Soobramoney v Minister of Health (KwaZulu-Natal)*<sup>354</sup> (“Soobramoney”) and

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<sup>351</sup> J Dugard & T Roux “The record of the South African Constitutional Court in providing an institutional voice for the poor: 1995-2004” in R Gargarella (ed) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (2006) 107.

<sup>352</sup> Dugard & Roux “The South African Constitutional Court” in *Courts and Social Transformation* 113.

<sup>353</sup> Dugard & Roux “The South African Constitutional Court” in *Courts and Social Transformation* 113.

<sup>354</sup> 1997 (12) BCLR 1696 (CC).

reasonableness review in *Government of the Republic of South Africa v Grootboom*<sup>355</sup> (“*Grootboom*”) and has evolved throughout the jurisprudence.

In the context of a democratic developmental state, I propose a conception of judicial review where the courts play a more robust role in developing the substantive contours of rights and promoting participation in socio-economic rights decision-making. There is considerable potential in the jurisprudence, as well as a democratic imperative, for the courts to further develop this approach, which I explore in greater depth below. But there is an existing tension in the courts’ understanding and application of the doctrine of separation of powers and their judicial role.<sup>356</sup> A democratic developmental state can provide a differentiated understanding of the separation of powers and judicial role conception.<sup>357</sup>

#### 4.4 From judicial deference to judicial prowess

In its original form, the doctrine of separation of powers was intended to guard against an over-concentration of state power by dividing government up into three spheres – legislative, executive and judicial.<sup>358</sup> Simply put, it thereby aimed to enhance democracy by intensifying accountability and efficiency, and protecting the fundamental rights of citizens against state tyranny.<sup>359</sup> At the same time, its boundaries are flexible and the doctrine has advanced since the early days into a system of “checks and balances” which

<sup>355</sup> 2000 (11) BCLR 1169 (CC).

<sup>356</sup> See Young (2010) *ICON* 418-420 where she suggests different role conceptions for courts’ responses to socio-economic rights infringements. These include: a catalytic court, a detached court, an engaged court and a supremacist court. She describes the South African Constitutional Court as a “catalytic court”.

<sup>357</sup> See Ray *Engaging with Social Rights* 8; R Hirschl “From Comparative Constitutional Law to Comparative Constitutional Studies” 11 *International Journal of Constitutional Law* 1 (2013); J De Ville “Deference as respect and deference as sacrifice: A reading of *Bato Star Fishing v Minister of Environmental Affairs and Tourism*” (2004) 20 *SAJHR* 577; T Allan “Common Law Reason and the limits of Judicial Deference” in D Dyzenhaus (ed) *The Unity of Public Law* (2004); H Corder “Administrative justice: A cornerstone of South Africa's democracy” (1998) 14 *SAJHR* 38; D Dyzenhaus “The Politics of Deference: Judicial Review and Democracy” in M Taggart (ed) *The Province of Administrative Law* (1997); C Hoexter “The future of judicial review in South African administrative law” (2000) 17 *SALJ* 484; K O'Regan “Breaking Ground: Some thoughts on the seismic shift in our administrative law” (2004) 121 *SALJ* 424; H Corder “Towards Administrative Justice in a Future South Africa” in *Empowerment and Accountability* (1991); E Mureinik “Reconsidering review: Participation and accountability” (1993) *Acta Juridica* 35.

<sup>358</sup> See I Currie & J De Waal *The New Constitutional and Administrative Law: Volume 1 - Constitutional Law* (2001); P Kurland “The rise and fall of the ‘doctrine’ of separation of powers” (1986) 85 *Michigan LR* 592; J Van der Vyver “The separation of powers” (1993) 8 *SA Public Law* 177.

<sup>359</sup> See Pieterse (2004) 20 *SAJHR* 383.



augments overall accountability by the different branches of government, monitoring and counterbalancing their respective exercise of power.<sup>360</sup> Judicial review of legislative and executive action is probably the most familiar and most striking instance of such checks and balances.<sup>361</sup>

Various commentators have reconceptualised the discourse on judicial involvement in the realisation of socio-economic rights in order to fashion an appropriate judicial role in a “socially just constitutional dispensation”.<sup>362</sup> The debate reflects the underlying tension between the separation of powers and judicial review as facilitating transformative constitutionalism under certain circumstances. There is a view that social justice is hampered through an overly deferential judicial approach when the executive and administration neglects the needs and interests of the poor.<sup>363</sup> Typical fears raised regarding the role of the judiciary revolve around the ideological legitimacy of socio-economic rights claims, and the institutional legitimacy and competence of courts in socio-economic matters.

South African courts are nonetheless constitutionally obliged to interpret the substance of socio-economic rights, to evaluate government compliance with the duties they impose, to pronounce on the validity of legislation and policy in the socio-economic

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<sup>360</sup> J Cassels “Judicial activism and public interest litigation in India: Attempting the impossible?” (1989) 37 *American J of Comparative L* 495 ; Van der Vyver (1993) 8 *SA Public Law* 185-85, 190-91; Currie & De Waal *Constitutional and Administrative Law* 92,95; Pieterse (2004) 20 *SAJHR* 385-89.

<sup>361</sup> See the main judgement in *Electronic Media Network Limited v e.tv (Pty) Limited* 2017 (9) *BCLR* 1108 (CC) paras 1-5 and the dissenting judgement paras 95-96. See also *Doctors for Life International v Speaker of the National Assembly* 2006 (12) *BCLR* 1399 (CC) para 23 (also quoted in *Land Access Movement of South Africa v Chairperson of the National Council of Provinces* 2016 (10) *BCLR* 1277 (CC) para 6) regarding the jurisdiction of the Constitutional Court in a matter where NCOP public participation processes on the Restitution of Land Rights Amendment Act 15 of 2014 were allegedly unreasonable).

<sup>362</sup> E Mureinik “Beyond a charter of luxuries: Economic rights in the Constitution” (1992) 8 *SAJHR* 464-74; S Liebenberg “Socio-Economic Rights” in M Chaskalson et al (eds) *Constitutional Law of South Africa* (2004); Davis *SAJHR* (2006) 301; Young (2010) *ICON* 385; Brand (2011) *Stel Law Rev* 614-638; K Young Constituting Economic and Social Rights 143 (2012); Ray (2013) *CCR* 173-232; Young (2013) *CCR* 233-243; D Landau “Aggressive Weak-Form Remedies” V (2014) *CCR* 244; J Dugard “Beyond Blue Moonlight: The Implications of Judicial Avoidance in Relation to the Provision of Alternative Housing” V (2014) *CCR* 265; Ray *Engaging with Social Rights* 8.

<sup>363</sup> See for example *Matatiele Municipality and Others v President of the RSA and Others (No 2)* 2007 (1) *BCLR* 47 (CC).

sphere and to remedy state non-compliance with socio-economic obligations.<sup>364</sup> In a democratic developmental state, the courts can play a more actively democratic role in order to fulfil their constitutional mandate and enhance accountability. I extrapolate below what it means for the courts to be an “active democratic structure” and what form of judicial review it requires in terms of interpretive and remedial techniques.<sup>365</sup>

Mark Tushnet examines two forms of judicial enforcement – weak and strong.<sup>366</sup> Applying that to social welfare rights, he explains the connection between the “state action” doctrine and the enforcement of social welfare rights. He describes weak substantive rights in constitutions as those that give legislatures an extremely broad range of discretion about providing those rights and direct that courts defer substantially to the legislature. That, formally, is the position in the US constitutional law. He argues that the weak form of enforcement may be particularly attractive. He cites the case of *Grootboom* as “a good example of a weak judicially enforceable social welfare right”.<sup>367</sup> He notes that in both *Grootboom* and the subsequent case *Minister of Health v Treatment Action Campaign (No 2)*<sup>368</sup> (“TAC”), the Constitutional Court rejected a version of strong substantive rights.<sup>369</sup> In that version, the Constitution requires the provision to all of some minimum amount of health care or shelter. In the TAC case, the Court asserted that it was not “institutionally equipped” to make the multiple factual and political enquiries required for determining what minimum core standards should be, nor for deciding how public finances should most appropriately be spent.<sup>370</sup> It continued, “Courts are ill-suited to adjudicate upon issues where Court orders could have multiple social and economic

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<sup>364</sup> Pieterse (2004) 20 SAJHR 383. Section 165(4) of the Constitution provides: “Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of courts.” Also quoted in *Zulu v eThekweni Municipality* 2014 (8) BCLR 971 (CC) para 70 in the judgement of Van der Westhuizen J.

<sup>365</sup> See discussion on “judicial prowess” in section 6.5.

<sup>366</sup> M Tushnet “Social welfare rights and the forms of judicial review” 82 *Texas Law Review* (2004) 1895, 1897.

<sup>367</sup> M Tushnet *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (2009) 242-243.

<sup>368</sup> 2002 (10) BCLR 1033 (CC).

<sup>369</sup> David Landau suggests a reconceptualisation of “weak-form” remedies into aggressive weak form remedies in Landau (2014) CCR 244.

<sup>370</sup> *Minister of Health v Treatment Action Campaign (No 2)* 2002 (10) BCLR 1033 (CC) para 37.



consequences for the community”.<sup>371</sup> This is the language of non-justiciability, Tushnet argues. Yet, the Court went on in both cases to enforce the relevant socio-economic right. In *TAC* the Court held although there are no clear lines separating the roles of the legislature, the executive and the courts, there are matters that are primarily the domain of one of the arms of government, but this does not mean that “courts cannot or should not make orders that have an impact on policy.”<sup>372</sup>

Tushnet argues that the Constitutional Court’s orders in *Grootboom* and *TAC* requiring the government to include a provision for “people in desperate need” in its plans, does shift the government’s priorities to some extent. Yet the Court’s order was quite limited in its effects. In particular, under the Court’s order the individual plaintiffs need not receive any relief at all. The government’s program would have been acceptable had it promised to provide some housing for people in desperate need within a reasonably short period of time. He argues that treating the rights as weak ones is consistent with the Constitution’s language, and particularly its requirement of reasonableness. Constitutional provisions allowing government to adopt reasonable programs to achieve social welfare rights, a willingness to find some programs unreasonable, and a remedial system that does not guarantee that any particular plaintiff will receive individualised relief, are characteristics of weak substantive social welfare rights. This weak form of rights adjudication does not accord with the concept of a South African democratic developmental state and the goals of transformative constitutionalism. A stronger form of participatory and substantive judicial review to ensure progress in the reduction of poverty and inequality is required.

The Constitutional Court in *Mazibuko v City of Johannesburg*<sup>373</sup> (“*Mazibuko*”) took a highly deferential stance based on the separation of powers, and did not follow the potential opened up in the *TAC* case for the courts to intervene further in policy design and implementation.<sup>374</sup> The approach in *Mazibuko* does not square with the notion of constitutional supremacy and the Constitutional mandate that courts interpret rights and

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<sup>371</sup> Para 38.

<sup>372</sup> Para 98.

<sup>373</sup> 2010 (3) BCLR 239 (CC).

<sup>374</sup> Para 61.

assess where they have been infringed.<sup>375</sup> Nor does it equate with a democratic developmental state where the judiciary can be a legitimate institutional platform for resolving the substantive interpretation of socio-economic rights and ensuring accountability in the provision of public goods to the poor. The Courts can enhance their role in the context of a democratic developmental state, by actively listening to all the role-players, including poor communities, and facilitating engagement on the resolution of socio-economic rights cases that come before the court. This does not require them to replace the policy and law domains of the executive and the legislature respectively. It instead promotes the role of the courts in assisting all relevant parties to come to sensible solutions that uphold the transformative intent of the Constitution, through engagement in the substance of socio-economic rights and the active participation of those affected.

Brian Ray describes the South African Constitutional Court's avoidance techniques as signalling limited substantive interpretation of constitutional rights, ceding to current legislation and policy and deliberately marginalising judicial authority.<sup>376</sup> The avoidance techniques include: the use of reasonableness review; new procedural remedies; highly abstract constitutional deliberation or fact-specific deliberation; and findings of unconstitutional conduct only in "easy" cases. It weakens the courts institutional and interpretative authority and "severely constrains its capacity to act as an independent partner in developing and implementing the social rights provisions".<sup>377</sup> He recommends "thick subsidiarity" which favours statutory interpretation that allows for elaboration of constitutional substance through iterative cooperative development with the legislature and the executive. He wants the courts to give an "independent, normative account of what the socio-economic rights require."<sup>378</sup>

Katharine Young takes issue with Ray's categorisation of the court and instead presents an alternative picture of the Constitutional Court's socio-economic rights jurisprudence,

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<sup>375</sup> See the Court's extensive discussion of the power of the courts to grant appropriate and effective remedies, and their interpretation of their role within the "separation of powers" in *Minister of Health v Treatment Action Campaign (No 2)* 2002 (10) BCLR 1033 (CC) paras 96-114.

<sup>376</sup> Ray (2013) CCR 173-232.

<sup>377</sup> Ray (2013) CCR 182.

<sup>378</sup> Ray (2013) CCR 192.

by rendering a typology that embodies the Court's capacity "to catalyse the resolution of the problems obstructing the right in question".<sup>379</sup> She contrasts this catalytic model with other comparative judicial role conceptions that she depicts as supremacist, engaged or detached roles. The types of judicial review that she puts forward under the catalytic conception, which resonate most with the judicial role conception in a democratic developmental state, is that of the "experimentalist" and "managerial review".<sup>380</sup> These forms of judicial review allow for a participatory, deliberative and iterative engagement between the courts and other stakeholders such as government, parties, communities and experts in order to craft policy solutions within a substantive description of the socio-economic right in question. They also confront systemic and structural features of poverty and inequality and require the courts to ensure that there is no recalcitrance on the part of the government or the parties by supervising mandatory relief orders.

Young observes that the Constitutional Court has in many instances "acted dynamically rather than statically, and actively rather than obstructively."<sup>381</sup> The remedy of meaningful engagement first devised in *Port Elizabeth Municipality v Various Occupiers*<sup>382</sup> ("PE Municipality") is an example of "experimentalist review". The "managerial review" has the court assuming direct responsibility for interpreting the substantive contours of the socio-economic right in question and supervising protection of the right via strict timelines and detailed plans, for example in *Grootboom*<sup>383</sup> and *Mazibuko*<sup>384</sup> in the lower courts, and in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*<sup>385</sup> ("Joe Slovo") and *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency*<sup>386</sup> ("AllPay") judgments in the Constitutional Court.

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<sup>379</sup> Young (2013) CCR 235. See Young (2010) ICON 385 for a full description of the typology.

<sup>380</sup> Young (2013) CCR 233-243.

<sup>381</sup> Young (2013) CCR 238.

<sup>382</sup> 2004 (12) BCLR 1268 (CC).

<sup>383</sup> *Grootboom v Oostenberg Municipality* 2000 (3) BCLR 277 (C).

<sup>384</sup> *Mazibuko v City of Johannesburg (Centre on Housing Rights and Evictions as amicus curiae)* (2008) 4 All SA 471 (W).

<sup>385</sup> 2009 (9) BCLR 847 (CC).

<sup>386</sup> 2014 (1) BCLR 1 (CC); *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 (6) BCLR 641 (CC); *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2015 (6) BCLR 653 (CC).

In the next section I undertake an analysis of the South African Constitutional Court's key socio-economic rights adjudication, within the framework and goals of a democratic developmental state. I examine the first and second wave of cases for the following results: direct, substantive relief to poor litigants; lasting systemic developmental outcomes; and opportunities for participation of the poor in the decisions affecting them. The transformative role of the courts in a democratic developmental state necessitates recognition that the empowerment of the poor includes actual material and psycho-socio-political elements, as illustrated by the multi-dimensional human rights approach to poverty. The judiciary can "democratise" itself by facilitating the substantive interpretation of socio-economic rights and ensuring direct relief to the poor, through the participation of poor litigants, legal and technical experts, in the tradition of deliberative and participatory democracy, and democratic experimentalism. In this way the adjudication of socio-economic rights can truly achieve the over-arching goals to reduce poverty and inequality, of a democratic developmental state.

#### **4.5 The essence of substance**

This section examines the evolution of the model of review in socio-economic rights cases, and distinguishes between cases that involve negative duties on the State, and those that involve positive duties. The jurisprudence of the South African Constitutional Court applies different models of review to negative and positive duties, based on differing obligations, as discussed above under international law on social and economic rights. The application by the Court of these models will be explored in this section. Then, building upon these models, I will discuss the limitations and potential for the Court to be an "active democratic structure" that substantively and collaboratively interprets the content of socio-economic rights to further transformative constitutionalism in a democratic developmental state.

#### 4 5 1 Nature of obligations under socio-economic rights

The Constitution places an overarching obligation on the state to “respect, protect, promote and fulfil the rights in the Bill of Rights”.<sup>387</sup> Similar to international law on social and economic rights, this clearly establishes that all the rights in the Bill of Rights impose a combination of negative and positive duties on the state. In relation to socio-economic rights provisions in the Constitution, the jurisprudence has been formulated around these positive and negative duties.<sup>388</sup>

The Court established the foundations of its jurisprudence on the positive duties imposed upon the State by the socio-economic rights in sections 26 and 27, in the earlier well-known cases *Soobramoney*,<sup>389</sup> *Grootboom*,<sup>390</sup> *TAC*<sup>391</sup> and *Khosa v Minister of Social Development*<sup>392</sup> (“*Khosa*”), through its construction of the “reasonableness test”.<sup>393</sup> These duties are subject to the qualifications of “reasonable measures”, “progressive realisation”, and the availability of resources in section 26(2) and 27(2). The Court has not clearly laid out its understanding of what positive duties these socio-economic rights impose, however, it has said that it does *not* entail the delineation by the courts of a minimum core content of rights that must be provided by the state.<sup>394</sup> Furthermore, as Liebenberg observes, the cases have generally elaborated two kinds of situations where the “reasonableness test” applies. Firstly, there are cases where the State has failed to develop or implement a programme to give effect to socio-economic rights. Secondly, there are cases where there is an allegation of unreasonable exclusion from legislation or programmes meant to give effect to socio-economic rights.<sup>395</sup>

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<sup>387</sup> Section 7(2).

<sup>388</sup> See discussion of negative and positive obligations in relation to public and private actors in *Daniels v Scribante* 2017 (8) BCLR 949 (CC) paras 37-58.

<sup>389</sup> *Soobramoney v Minister of Health (KwaZulu-Natal)* 1997 (12) BCLR 1696 (CC).

<sup>390</sup> *Government of the RSA v Grootboom* 2000 (11) BCLR 1169 (CC).

<sup>391</sup> *Minister of Health v Treatment Action Campaign (No 2)* 2002 (10) BCLR 1033 (CC).

<sup>392</sup> 2004 (6) BCLR 569 (CC).

<sup>393</sup> See section 4 5 3 and 4 5 4 below.

<sup>394</sup> See section 4 5 6 below.

<sup>395</sup> Liebenberg *Socio-Economic Rights* 133.

The Constitutional Court has also asserted that sections 26(1) and 27(1) entail a negative duty on the state to “desist from preventing or impairing” access to the rights.<sup>396</sup> The Court in *Jaftha v Schoeman*<sup>397</sup> (“*Jaftha*”) held that the deprivation of a person’s existing access to housing amounted to a negative violation of the right to housing. Furthermore, it held that this negative violation was not subject to the qualifications of “reasonable measures”, “progressive realisation”, and the availability of resources in section 26(2). Once the violation has been shown, the burden then shifts to the State to justify the deprivation under the general limitations clause (section 36).<sup>398</sup>

The Court has been bolder when called on to protect an unqualified right such as the section 26(3) right not to be arbitrarily evicted from one’s home, as it did in *Port Elizabeth Municipality*,<sup>399</sup> *Joe Slovo*<sup>400</sup> and *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg*<sup>401</sup> (“*Olivia Road*”). In addition to clarifying the state’s negative obligation in relation to this right, the Court has also read particular positive obligations into section 26(3). It places an obligation on the state in eviction cases to provide alternative accommodation or land when evictions are being undertaken. In *Joe Slovo*, the Court held that in determining in each case whether an eviction order was just and equitable (and consequently reasonable), the court would have to take into account “the reasonableness of offers made in connection with suitable alternative accommodation”,<sup>402</sup> with particular reference to vulnerable occupiers (for example, the elderly, children, disabled persons and female-headed households), and suitability of

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<sup>396</sup> *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) para 34; *Minister of Health v Treatment Action Campaign (No 2)* 2002 (10) BCLR 1033 (CC) para 46.

<sup>397</sup> *Jaftha v Schoeman*; *Van Rooyen v Stoltz* 2005 (1) BCLR 78 (CC). The case concerned the constitutionality of provisions permitting the sale in execution of people’s homes in order to satisfy debts.

<sup>398</sup> Paras 31-34.

<sup>399</sup> *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC).

<sup>400</sup> *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 (9) BCLR 847 (CC).

<sup>401</sup> 2008 (5) BCLR 475 (CC). See the numerous recent cases: *South African Informal Traders Forum v City of Johannesburg*; *South African National Traders Retail Association v City of Johannesburg* 2014 (6) BCLR 726 (CC); *Zulu v eThekweni Municipality* 2014 (8) BCLR 971 (CC); *MC Denneboom Service Station CC v Phayane* 2014 (12) BCLR 1421 (CC); *Pitje v Shibambo* 2016 (4) BCLR 460 (CC); *Molusi v Voges N.O.* 2016 (7) BCLR 839 (CC); *Occupiers of Erven 87 and 88 Berea v De Wet* (CCT108/16) [2017] ZACC 18 (8 June 2017).

<sup>402</sup> *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC) paras 30-1.

alternative accommodation in terms of proximity to employment, schools, clinics, transport and other social amenities.<sup>403</sup>

In the most recent case addressing the right to property (section 25(6)), *Daniels v Scribante*<sup>404</sup> (“*Daniels*”), the court distinguished between positive and negative obligations in relation to private land-owners, building on the judgements in *Governing Body of the Juma Musjid Primary School and Another v Ahmed Asruff Essay*<sup>405</sup> (“*Juma Musjid*”), and *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*<sup>406</sup> (“*Blue Moonlight*”). The court, in five separate but concurring judgements, held that a private landowner has both negative and positive obligations with respect to socio-economic rights for poor and vulnerable people.

In the education cases *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo*<sup>407</sup> (“*Hoërskool Ermelo*”), *KwaZulu-Natal Joint Liaison Committee v Member of the Executive Council, Department of Education, KwaZulu-Natal*<sup>408</sup> (“*KZN Joint Liaison Committee*”), *Head of Department, Department of Education, Free State Province v Welkom High School*<sup>409</sup> (“*Welkom High School*”), *MEC for Education in Gauteng Province v Governing Body of Rivonia Primary School*<sup>410</sup> (“*Rivonia Primary School*”) and *Federation of Governing Bodies for South African Schools v Member of the Executive Council for Education, Gauteng*<sup>411</sup> (“*FEDSAS*”), the Constitutional Court has provided a substantive interpretation of the unqualified right to education in section 29 and required the state to respect, protect, promote and fulfil such rights.<sup>412</sup> It has underlined the historic injustices

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<sup>403</sup> *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 (9) BCLR 847 (CC) 165, 322.

<sup>404</sup> (CCT50/16) [2017] ZACC 13 (11 May 2017) paras 37-58.

<sup>405</sup> 2011 (8) BCLR 761 (CC) paras 57-8.

<sup>406</sup> 2012 (2) BCLR 150 (CC) para 36.

<sup>407</sup> 2010 (3) BCLR 177 (CC).

<sup>408</sup> 2013 (6) BCLR 615 (CC).

<sup>409</sup> 2013 (9) BCLR 989 (CC).

<sup>410</sup> 2013 (12) BCLR 1365 (CC).

<sup>411</sup> 2016 (8) BCLR 1050 (CC).

<sup>412</sup> See in particular *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (3) BCLR 177 (CC) paras 1, 2, 42, 43; *MEC for Education in Gauteng Province v Governing Body of Rivonia Primary School* 2013 (12) BCLR 1365 (CC) paras 1-3; *Federation of Governing Bodies for South African Schools v Member of the Executive Council for Education, Gauteng* 2016 (8) BCLR 1050 (CC) paras 1-3.



of apartheid education, the transformational role of access to quality education, and the democratic nature of the current public schooling system in South Africa.

#### 4 5 2 Models of review applied to negative and positive obligations in socio-economic rights jurisprudence

In cases where State action is held to deprive people of pre-existing access to socio-economic rights, the Court has identified this as being a *prima facie* breach of the negative duty “to respect” the relevant rights located in subsections 26(1), 27(1) and section 29.<sup>413</sup> In *Juma Musjid*, Nkabinda J described this duty thus:

“Breach of this obligation occurs directly when there is a failure to respect the right or indirectly, when there is a failure to prevent the direct infringement of the right by another or a failure to respect the existing protection of the right by taking measures that diminish that protection.”<sup>414</sup>

The State’s justifications for the breach are then evaluated against the strict “purpose and proportionality requirements” under the general limitations clause (section 36),<sup>415</sup> in the manner of the traditional two-stage approach to constitutional review of other rights in the Bill of Rights. The negative duties under socio-economic rights have also been held to be horizontally applicable to other action besides State action.<sup>416</sup>

A different model of review has emerged from cases dealing with the positive duties imposed by socio-economic rights in sections 26 and 27 through the earlier cases of *Soobramoney*, *Grootboom*, *TAC* and *Khosa*, and then haphazardly applied in *Mazibuko*.

<sup>413</sup> G Quinot & S Liebenberg “Narrowing the band: Reasonableness review in administrative justice and socio-economic rights jurisprudence in South Africa” (2011) 22 (3) *Stellenbosch Law Review* 639-663.

<sup>414</sup> *Governing Body of the Juma Musjid Primary School and Another v Ahmed Asruff Essay NO 2011* (8) BCLR 761 (CC) para 58. See also Quinot & Liebenberg (2011) *Stellenbosch Law Review* 653.

<sup>415</sup> Quinot & Liebenberg (2011) *Stellenbosch Law Review* 653.

<sup>416</sup> Based on section 8(2) and (3). See for example: *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) para 34; *Minister of Health v Treatment Action Campaign (No 2)* 2002 (10) BCLR 1033 (CC) para 46; *Jaftha v Schoeman*; *Van Rooyen v Stoltz* 2005 (1) BCLR 78 (CC) paras 33-34; *Governing Body of the Juma Musjid Primary School and Another v Ahmed Asruff Essay NO 2011* (8) BCLR 761 (CC) para 58; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) BCLR 150 (CC); *Occupiers of Portion R25 of the Farm Mooiplaats 355JR v Golden Thread Limited* 2012 (4) BCLR 372 (CC); *MC Denneboom Service Station CC v Phayane* 2014 (12) BCLR 1421 (CC); *Pitje v Shibambo* 2016 (4) BCLR 460 (CC); *Molusi v Voges N.O.* 2016 (7) BCLR 839 (CC); *Daniels v Scribante* 2017 (8) BCLR 949 (CC) paras 37-58.

The Court has held that the positive duties to achieve the realisation of socio-economic rights for those who lack access to socio-economic rights, or whose current access is inadequate, “is both defined and limited by the criteria of reasonableness, progressive realisation and the State’s available resources”.<sup>417</sup>

Finally, the Court has also applied the reasonableness model of review in relation to unqualified socio-economic rights, such as children’s socio-economic rights in section 28(1)(c). For example in *Grootboom*, the Court rejected the claim based on the right of children to shelter in section 28(1)(c) of the Constitution on the basis that the primary obligation to provide shelter for the children lay on the parents and families, and only if they could not provide such, the obligation fell on the State.<sup>418</sup> In *TAC*, the Court concluded that the impact on children’s health rights under section 28(1)(c) was only a factor in the overall assessment as to whether the government’s PMTCT programme was unreasonable in terms of section 27(2).<sup>419</sup>

The case of *Juma Musjid*, dealing with the right to education in section 29(1)(a), was the first time that the Court read an unqualified socio-economic right, without inclusion of the reasonableness test. In this case, the Court held that the right to basic education in section 29(1)(a) is “immediately realisable”, subject only to the limitations clause (section 36).<sup>420</sup> Right to education cases since then, namely *Hoërskool Ermelo*, *KZN Joint Liaison Committee*, *Welkom*, *Rivonia* and *FEDSAS* have reiterated the unqualified right to education. However, the South African government’s qualification of the right to education as being subject to “progressive realisation”, upon ratification of the ICESCR, is cause for concern.<sup>421</sup>

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<sup>417</sup> *Soobramoney v Minister of Health (Kwazulu-Natal)* 1997 (12) BCLR 1696 (CC) para 11. *Minister of Health v Treatment Action Campaign (No 2)* 2002 (10) BCLR 1033 (CC) paras 30-39.

<sup>418</sup> *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) paras 15, 70, 75-78.

<sup>419</sup> *Minister of Health v Treatment Action Campaign (No 2)* 2002 (10) BCLR 1033 (CC) paras 74-79.

<sup>420</sup> *Governing Body of the Juma Musjid Primary School and Another v Ahmed Asruff* Essay NO 2011 (8) BCLR 761 (CC) para 37.

<sup>421</sup> ESCR-Net <<https://www.escr-net.org/news/2015/government-south-africa-ratifies-icescr>> (accessed 01-05-2017).

### 4 5 3 Evolution of reasonableness review

In *Soobramoney*, the first socio-economic rights case that came before the Constitutional Court, the Court assessed whether the justifications of the State for rejecting kidney dialysis treatment for the applicant at a state institution, were fair and reasonable. The Court applied a cost-benefit analysis in evaluating the criteria for access to kidney dialysis treatment.<sup>422</sup> It held that due to the high cost of the kidney dialysis programme, providing such treatment to a wider range of patients in need, would jeopardise other health priorities of the State, in particular primary health care.<sup>423</sup> The Court did not focus on the normative goals and purposes of the right of access to health services in sections 27(1)(a) and (2), but instead paid greater attention to the State's justifications for not providing access to the right to emergency medical treatment in section 27(3).<sup>424</sup> They failed to ascertain the nature of the decision or of the right affected. On the other hand, in the delictual case of *Oppelt v Head: Health, Department of Health Provincial Administration: Western Cape*<sup>425</sup> ("*Oppelt*"), the Constitutional Court determined that the conduct of health care workers at a provincial hospital was negligent and violated the constitutional right to emergency medical treatment. The court went into some detail on what the right itself means.<sup>426</sup>

In the *Grootboom* case, the Constitutional Court elaborated upon the content of the qualifications on socio-economic rights set out in sections 26(2) and 27(2). It developed a model of "reasonableness review" for adjudicating positive claims under these rights. In particular, it focused on the fact that it is incumbent on the State to institute a "reasonable programme" in order to "progressively realise" the socio-economic rights enumerated in sections 26 and 27 of the Constitution. The central question for the Court

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<sup>422</sup> Quinot & Liebenberg (2011) *Stellenbosch Law Review* 654.

<sup>423</sup> *Soobramoney v Minister of Health (Kwazulu-Natal)* 1997 (12) BCLR 1696 (CC) para 28.

<sup>424</sup> Quinot & Liebenberg (2011) *Stellenbosch Law Review* 654.

<sup>425</sup> 2015 (12) BCLR 1471 (CC) paras 54-56.

<sup>426</sup> Paras 55-57.

is whether the means chosen are reasonably capable of facilitating the realisation of the socio-economic rights in question.<sup>427</sup> This is referred to as a means-ends enquiry.<sup>428</sup>

Quinot and Liebenberg suggest that the *Grootboom* judgment applies a “proportionality approach” in that the government was granted a “margin of discretion” relating to the policy choices for their public housing programme, but the Court could inquire whether such measures constituted a reasonable solution to the socio-economic deprivation at issue.<sup>429</sup> Reasonableness must also be assessed in light of the broader normative goals that the socio-economic rights sought to achieve, such as human dignity, freedom and equality.<sup>430</sup> The Court did spend some time developing a substantive interpretation of the right to housing. It discussed the content of housing as a human right, as well as how it contributes to the promotion of foundational constitutional values such as human dignity, and other rights in the Bill of Rights. Yacoob J described housing as entailing more than a physical structure of “bricks and mortar”,<sup>431</sup> and refers in this context to land and various services such as water, sewage and refuse removal.<sup>432</sup> Human dignity is the underlying value upon which the Court based its key finding in *Grootboom*, that reasonableness requires as a minimum, short-term relief for those whose needs are urgent and “who are living in intolerable conditions or crisis situations”.<sup>433</sup> A statistical improvement was thus not found to necessarily pass the reasonableness test, if it is not appropriately responsive to the circumstances of those in desperate need.<sup>434</sup> The Court also referred to international law in its judgment, in particular the International Covenant on Economic, Social and Cultural Rights and its General Comment No.3.<sup>435</sup> It did not

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<sup>427</sup> *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) para 46.

<sup>428</sup> Para 78. See also Brand “What are socio-economic rights for?” *Rights and Democracy* 40.

<sup>429</sup> Quinot & Liebenberg (2011) *Stellenbosch Law Review* 655.

<sup>430</sup> *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) paras 23, 44.

<sup>431</sup> Para 81.

<sup>432</sup> Para 35.

<sup>433</sup> Paras 63-64, 99. See also the more recent judgement in *Daniels v Scribante* 2017 (8) BCLR 949 (CC) on the importance of security of tenure to human dignity.

<sup>434</sup> *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) para 44.

<sup>435</sup> Para 45.

endorse the Committee's minimum core approach, but did assimilate the Committee's interpretation of the concept of "progressive realisation".<sup>436</sup>

In *Grootboom* the Court laid down criteria against which to measure the reasonableness of a government programme to realise socio-economic rights.<sup>437</sup> The content of the programme must be coordinated, comprehensive and "capable of facilitating the realisation of the right";<sup>438</sup> it must be balanced and flexible<sup>439</sup> and pay attention to short, medium and long-term needs.<sup>440</sup> Appropriate financial and human resources must be made available for the programme.<sup>441</sup> It must also be inclusive and ensure that it does not "exclude those in desperate need and living in intolerable conditions".<sup>442</sup> The court also asserted that the policies and programmes must be reasonable both in their *conception* and their *implementation*<sup>443</sup> and must be transparent and its contents must be made known to the public.<sup>444</sup>

In the *Khosa* case, involving the rights of non-citizens to access socio-economic rights, the Court found that a number of rights were at stake and emphasised the interconnectedness of the rights in the Bill of Rights as a factor in ascertaining the reasonableness of a measure.<sup>445</sup> Apart from the socio-economic right to social assistance, the case also affected the right to life, dignity, and equality. The Court expanded upon the reasonableness test previously used. The court stated that:

"[W]hen the rights to life, dignity and equality are implicated in dealing with socio-economic rights, they have to be taken into account along with the availability of human and financial resources in determining whether the state has complied with the

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<sup>436</sup> Paras 26-33, 45.

<sup>437</sup> Paras 39-44.

<sup>438</sup> Paras 39-41.

<sup>439</sup> Para 43.

<sup>440</sup> Para 43.

<sup>441</sup> Para 39.

<sup>442</sup> Paras 43-44. The Constitutional Court reaffirmed these principles in *Minister of Health v Treatment Action Campaign (No 2)* 2002 (10) BCLR 1033 (CC) para 68.

<sup>443</sup> *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) para 40-43.

<sup>444</sup> *Minister of Health v Treatment Action Campaign (No 2)* 2002 (10) BCLR 1033 (CC) para 123.

<sup>445</sup> *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) BCLR 569 (CC) paras 40-44.

constitutional standard of reasonableness. This is, however, not a closed list and all relevant factors have to be taken into account in this exercise. What is relevant may vary from case to case depending on the particular facts and circumstances.”<sup>446</sup>

An ever-increasing list of factors has evolved through *Grootboom*, *TAC*, *Khosa* and the eviction cases – *Olivia Road*, *Joe Slovo* – that must be considered as indicators of the reasonableness of the measures adopted by the State. These now include: reasonable conceptualisation and implementation of programmes;<sup>447</sup> non-discrimination against groups in their access to specific programmes;<sup>448</sup> the impact of the deprivation on other rights such as life, dignity and equality;<sup>449</sup> and “meaningful engagement” with affected groups.<sup>450</sup>

The critical elements of this test - in the context of poverty - is that the State is obliged to ensure that a programme aimed at realising socio-economic rights must consider the needs of the most vulnerable, as well as the majority of those in need. If the development of the programme does not articulate a component for addressing the needs of the most vulnerable, it will not pass muster. If it does so on paper but it does not translate into implementation on the ground, it will also fail the reasonableness test. The transparency requirement could be applied to the process of the development of the policy or programme, as well as the informational aspect thereafter.<sup>451</sup> This would ensure that the constitutional values of human dignity, non-discrimination, accountability, transparency and participatory democracy are promoted.<sup>452</sup> These values are core to a democratic developmental state.

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<sup>446</sup> Para 44.

<sup>447</sup> *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) paras 40-43.

<sup>448</sup> *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) BCLR 569 (CC).

<sup>449</sup> Para 44.

<sup>450</sup> *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC); *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (5) BCLR 475 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 (9) BCLR 847 (CC); *Governing Body of the Juma Musjid Primary School and Another v Ahmed Asruff Essay NO* 2011 (8) BCLR 761 (CC). See full discussion of “meaningful engagement” as a remedy in 4 6 2 below.

<sup>451</sup> See chapter two on participatory processes required for policy development in the Constitution.

<sup>452</sup> See Quinot & Liebenberg (2011) *Stellenbosch Law Review*; and D Brand Courts, *Socio-economic Rights and Transformative politics* LLD thesis University of Stellenbosch (2009).

#### 4 5 4 Shortcomings of reasonableness review since *Mazibuko*

*Mazibuko* dealt with the right to sufficient water under section 27(1)(b) of the Constitution. The applicants in the case were five poor residents of Phiri in Soweto, one of the poorest urban township areas of Johannesburg. The respondents were the City of Johannesburg, Johannesburg Water (a company wholly owned by the City), and the national Minister for Water Affairs and Forestry. Appearing as *amicus curiae* was the international NGO, Centre on Housing Rights and Evictions ('COHRE'). The case arose initially out of the organising efforts of the Anti-Privatisation Forum (APF), a South African social movement, and supported in its advocacy and litigation efforts by the Centre for Applied Legal Studies ("CALS") at the University of Witwatersrand, along with other human rights organisations.

In this case, the Courts considered the lawfulness of Operation Gcin'amanzi, a pilot project of the City of Johannesburg in Phiri in early 2004 to attend to the high volume of water loss and non-payment of water services in Soweto. The project entailed laying water pipes to increase water supply and minimise water loss, as well as the installation of pre-paid meters. The meters would charge consumers for use of water in excess of the 6 kilolitre per household monthly free basic water allowance and disconnect them for non-payment. The applicants challenged the City of Johannesburg's Free Basic Water policy ('FBW') in terms of which 6 kilolitres of water are provided monthly for free to all households in Johannesburg and the lawfulness of the installation of pre-paid water meters in Phiri. The City's FBW policy was based on the national government's regulations which stipulate that a basic water supply constitutes 25 litres per person daily, or 6 kilolitres per household with average of 3,2 persons monthly.

The South Gauteng High Court found that the installation of pre-paid water meters in Phiri was unlawful and unfair.<sup>453</sup> It also held that the City's FBW policy was unreasonable

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<sup>453</sup> *Mazibuko v City of Johannesburg and Others (Centre on Housing Rights and Evictions as amicus curiae)* [2008] 4 All SA 471 (W).



and therefore unlawful. It ordered that the City should provide 50 litres of free basic water daily to the applicants and “similarly placed” residents of Phiri.

On appeal, the Supreme Court of Appeal (“SCA”) held that 42 litres of water per day amounted to “sufficient water” within the meaning of section 27(1)(b) of the Constitution, and ordered the City to adjust its policy accordingly.<sup>454</sup> The SCA also held that the installation of the pre-paid water meters was unlawful due to the fact that the City’s By-laws did not make provision for them in these circumstances. The Court gave the City two years to amend the By-laws. The Supreme Court of Appeal did not consider whether the manner in which the meters were installed was fair.

The case then went on appeal to the Constitutional Court. All the parties before the Court agreed that the old system of water supply to Soweto was problematic and unsustainable.<sup>455</sup> The applicants however asserted that the City’s FBW policy and the way in which it was implemented was unlawful, unreasonable, unfair and in breach of their constitutional right to sufficient water. The City presented that there had been extensive consultation with communities about the content of the project and the implementation of Operation Gcina’manzi.<sup>456</sup> The City alleged that by the time the applicants brought their challenge in the High Court eighteen months later, the vast majority of residents had accepted pre-paid water meters and according to a survey the City undertook, they were satisfied with the new system. In addition, the wastage of water had been effectively minimised. The City also argued further that its FBW policy had been under constant review since it was adopted in order to ensure that it was meeting its obligation to take measures to progressively realise the right of access to sufficient water.<sup>457</sup>

The Constitutional Court held that the obligation placed on government by section 27(1)(b) is an obligation to take reasonable legislative and other measures to seek the progressive realisation of the right. In relation to the FBW policy, therefore, the question

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<sup>454</sup> *City of Johannesburg v Mazibuko* 2009 (8) BCLR 791 (SCA).

<sup>455</sup> *Mazibuko v City of Johannesburg* 2010 (3) BCLR 239 (CC) para 166.

<sup>456</sup> Para 167.

<sup>457</sup> Para 168.

they had to consider was whether it was a reasonable policy. Unlike the High Court and the Supreme Court of Appeal, the Constitutional Court did not find it appropriate to give a quantified content to what constitutes “sufficient water” as they stated that is a matter of policy that should be left to the executive to decide upon.<sup>458</sup> The Court concluded that the FBW policy cannot be said to be unreasonable since 80% of the households in the City receive adequate water under the policy.<sup>459</sup> The Court also noted that 100 000 households within Johannesburg still lack access to the most basic water supply, that is a tap within 200m of their household.<sup>460</sup>

In its judgement, the Court gave a very narrow construction of the standard of reasonableness review for assessing positive duties.<sup>461</sup> The Court took an extreme deferential stance, justified by its concerns regarding the “proper role” of the courts in relation to other branches of government. O’Regan J stated that it is “institutionally inappropriate” for courts to precisely delineate what it will take to achieve a particular socio-economic right. She asserted that this is a clear mandate of the executive and legislative arms of government, which are institutionally bound, democratically selected and well positioned to examine such social needs, conditions and resources required.<sup>462</sup>

The Court went on to hold that the Court’s role in enforcing positive duties under socio-economic rights is two-fold. First, in the absence of the government taking steps to realise socio-economic rights, “the courts will require the government to take steps”.<sup>463</sup> Second, the courts will intervene if the steps taken by the government “fail to meet the constitutional standard of reasonableness”.<sup>464</sup> The Court identified three situations where unreasonableness would be evident: a.) where no provision is made for those desperately

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<sup>458</sup> *Mazibuko v City of Johannesburg* 2010 (3) BCLR 239 (CC) para 62-68. See substantive content of the right to water not considered by the Court, in Committee on Economic, Social and Cultural Rights, Twenty-ninth session Geneva, 11-29 November 2002 General Comment No. 15 (2002) The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights) E/C.12/2002/11.

<sup>459</sup> *Mazibuko v City of Johannesburg* 2010 (3) BCLR 239 (CC) para 89.

<sup>460</sup> Para 14.

<sup>461</sup> See Quinot & Liebenberg (2011) *Stellenbosch Law Review* 657; Liebenberg *Socio-Economic Rights* 468-472.

<sup>462</sup> *Mazibuko v City of Johannesburg* 2010 (3) BCLR 239 (CC) para 61.

<sup>463</sup> Para 67.

<sup>464</sup> Para 67.

in need;<sup>465</sup> b.) socio-economic policies contain unreasonable exclusions or restrictions;<sup>466</sup> and c.) a failure by government “continually to review its policies to ensure that the achievement of the right is progressively realised”.<sup>467</sup>

In applying these criteria, the Court found that the provision of 25 litres per person per day, as prescribed by national legislation and regulations, was not unreasonable. Despite the Court’s analysis of the facts surrounding the provision of basic water to the Phiri community, it was swayed by the justifications of the State and chose not to engage with the arguments regarding the sufficiency of the allocation of 25 litres per person per day. The Court had substantial evidence before it, from the State, the community and other relevant experts to make such a determination, but it refrained from doing so. It acknowledged the normative content of the right at the beginning of the judgement: “Water is life” and “Human beings need water to drink, to cook, to wash and to grow our food. Without it, we will die.”<sup>468</sup> However no further analysis of the nature of the right or the impact of the basic water allowance on households in the Phiri community, such as Ms Mazibuko, was done.

On the issue of pre-paid water meters, the Court held that national legislation and the City’s own by-laws authorised the latter to introduce pre-paid water meters as part of Operation Gcin’amanzi. The Court concluded that the installation of the meters was neither unfair nor discriminatory.<sup>469</sup> The Court commended the City for constantly reviewing and revising its policies in order to promote the progressive achievement of the right of access to sufficient water and thus found them to be reasonable on that basis. The Court thus upheld the appeal by the City and Johannesburg Water and the Minister and set aside the orders of the High Court and Supreme Court of Appeal.<sup>470</sup>

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<sup>465</sup> *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC).

<sup>466</sup> *Mazibuko v City of Johannesburg* 2010 (3) BCLR 239 (CC) para 67.

<sup>467</sup> Para 67. See Quinot & Liebenberg (2011) *Stellenbosch Law Review* 658.

<sup>468</sup> Para 1.

<sup>469</sup> Para 154-157.

<sup>470</sup> *Mazibuko v City of Johannesburg* 2010 (3) BCLR 239 (CC) para 158.

#### 4 5 5 Critique of reasonableness review: The absence of substance

One of the key critiques of the Court's reasonableness review model for positive duties imposed by socio-economic rights, is the Court's lack of engagement with the substantive content of socio-economic rights.<sup>471</sup> The Court's main inquiry is instead focused on whether a government programme meets the various criteria for reasonableness as set out above.

Cass Sunstein and others have described this model of review as derivative of administrative law.<sup>472</sup> Danie Brand depicts the Constitutional Court's early socio-economic rights jurisprudence as "proceduralising its adjudication".<sup>473</sup> Brand describes the Court's jurisprudence as focusing on "structural rather than concrete guiding values and ends: structural good governance standards such as legality (rationality and non-arbitrariness), coherence, coordination and inclusivity in government policy formulation and decision-making".<sup>474</sup> He critiques the Court for setting itself up as an "impartial referee" and not delving into the content of rights, but rather enquiring whether the policy structurally, met with the requirements of reasonableness. He argues further that the Court in *Soobramoney*, *Grootboom* and *TAC* omitted entirely a necessary exploration of the "ends" (the content of the rights) the reasonable measures are meant to achieve, thus ignoring the first part of the section 26 and 27 enquiry. Similarly, the Constitutional Court in *Mazibuko* refused to engage in the actual content of the right to "sufficient" water but chose instead to focus on the broad ambit of the reasonableness of the policies and procedural elements.

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<sup>471</sup> See Brand "What are socio-economic rights for?" *Rights and Democracy* 33-56; S Liebenberg *The Judicial Enforcement of Social Security Rights in South Africa: Enhancing Accountability for the Basic Needs of the Poor* (2005) 14; D Bilchitz "Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence" (2003) 19 *SAJHR* 1-26 5-11; Pieterse *SAJHR* 406-407. See detailed arguments in Liebenberg *Socio-Economic Rights* 163-173.

<sup>472</sup> Brand "What are socio-economic rights for?" *Rights and Democracy*. C Sunstein "Social and Economic Rights? Lessons from South Africa" University of Chicago, Public Law Working Paper No. 12 (2001) <[http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1454&context=law\\_and\\_economics](http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1454&context=law_and_economics)> (accessed 30-09-2016). See further discussion in chapters five and six.

<sup>473</sup> Brand "What are socio-economic rights for?" *Rights and Democracy* 36.

<sup>474</sup> Brand "What are socio-economic rights for?" *Rights and Democracy* 36.

I argue that the Courts can marry this procedural/structural approach with a content-focused approach, along the lines of the experimentalist review approach, as a means to determining a solution to problems of poverty and inequality. This would be way of “democratising the courts” and holding the legislature and executive accountable for socio-economic transformation in a democratic developmental state. *Mazibuko* provided a perfect opportunity for the Court through collaborative engagement, to define how much water is “sufficient” for purposes of a dignified and healthy existence for people living in poverty. The Court would not have to assume a supremacist stance and unilaterally declare the content, but could instead have moved the parties to agree on a reasonable amount. This would have been a different approach to the High Court (‘HC’) and Supreme Court of Appeal (‘SCA’) laying down the substance of the right as either 50 or 42 litres, but rather the court facilitating deliberation and an agreement based on balancing needs and resources. The Court could thus proactively determine the parameters of the content of rights, together with the technical and legal experts, litigants, affected communities and the state, as an “active democratic structure”. Instead of only inquiring into procedural aspects of decision-making with respect to policy, programming and planning in socio-economic rights cases, the Courts should also be delving into the substance of socio-economic rights.

Furthermore, the Court’s very own reasonableness criteria requires a substantive content analysis, with respect to the following: the programme must be “capable of facilitating the realisation of the right”;<sup>475</sup> it must pay attention to “short, medium and long-term needs”;<sup>476</sup> measures cannot leave out of account the “degree and extent of the denial of the right they endeavour to realise”;<sup>477</sup> “those whose needs are most urgent and whose ability to enjoy all rights is therefore most in peril, must not be ignored by the measures aimed at achieving realisation of the right”; “if the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the

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<sup>475</sup> *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) paras 39-41.

<sup>476</sup> Para 43.

<sup>477</sup> Para 44.

test”.<sup>478</sup> It is not possible to circumvent an exploration of the substance of socio-economic rights, if the Court requires itself to understand the needs of the poor, the realisation of the right in question, the denial of the right and the enjoyment of the right. The so-called ends of the right, in the means-end analysis, can only be determined by examining the content of the right. This is the legitimate role of the courts in a democratic developmental state and can be accomplished through engagement with experts, affected communities and their representatives, and the state at the review and remedial stages of adjudication.

The reluctance of the Court to elaborate the content of socio-economic rights and the nature of the state’s positive obligations vis-à-vis each right, has held back the transformative potential of South Africa’s socio-economic rights jurisprudence. The Court’s relatively weak standard of review has diminished the ability of the Court to systemically support the upliftment of the poor.<sup>479</sup> The Constitutional Court’s unfortunate interpretation of “progressive realisation” does not take into account an analysis of whether policies improve conditions for “a larger number of people” or “a wider range of people”.<sup>480</sup> Systemic change and developmental progress is key to achieving long-term, sustainable, poverty alleviation, as the primary aim of a democratic developmental state.

It is only in relation to more recent cases on the unqualified right to education and the right not to be evicted from one’s home where the Court has been proactive in its substantive interpretation of what the rights entail. In the recent case of *Daniels*<sup>481</sup> the court, in five separate but concurring judgements, described in elaborate detail the historical dispossession of land in South Africa and the conditions under which poor and vulnerable African, Indian and Coloured people had to live, and still live. The court discussed the obligations of a landowner with respect to the substandard living

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<sup>478</sup> Para 44. The Constitutional Court reaffirmed these principles in *Minister of Health v Treatment Action Campaign (No 2)* 2002 (10) BCLR 1033 (CC) para 68.

<sup>479</sup> Tushnet *Texas Law Review* 2003-2004.

<sup>480</sup> *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) para 41.

<sup>481</sup> *Daniels v Scribante* 2017 (8) BCLR 949 (CC) see for example paras 33, 34 and 37.

conditions of a domestic worker living on his land, under the right to property (section 25(6)), and held that the occupier was entitled to make improvements to bring the dwelling to a standard that is constitutionally compliant. The court placed a positive obligation on the landowner to ensure the occupier's enjoyment of the section 25(6) right to secure tenure. The parties were ordered to engage meaningfully with one another regarding the implementation of the improvements, in particular with respect to the building plans and their approval, and the movement of builders on site.

A requirement for participation of affected people and communities in fleshing out the most appropriate way to realise the right in question, albeit another procedural (structural) requirement, would also foster the empowerment of poor people in a democratic developmental state. I argue that this is a possible interpretation of the reasonableness requirement of transparency and openness stipulated in *Grootboom*,<sup>482</sup> as well as the appropriate role for government and affected communities established in *Olivia Road* and *Joe Slovo* through "meaningful engagement".<sup>483</sup>

#### 4 5 6 "Minimum core" content

The Court's explicit rejection of a minimum core content of socio-economic rights, in my opinion, also left a vacuum for a more substantive interpretation of the various rights. In the context of considering the concept of directly enforceable "minimum core" obligations on the State, the Constitutional Court rejected an interpretation of socio-economic rights that would allow "a self-standing and independent positive right enforceable irrespective of the considerations mentioned in section 27(2)".<sup>484</sup> This is however not the only possible interpretation of a minimum core content of a socio-economic right.<sup>485</sup> I suggest an approach to the minimum core content debate - within

<sup>482</sup> *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC).

<sup>483</sup> *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (5) BCLR 475 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 (9) BCLR 847 (CC).

<sup>484</sup> Para 39.

<sup>485</sup> See K Young "The minimum core of economic and social rights: A concept in search of content" (2008) 33 *The Yale Journal of International Law* 113, for a very useful analytical discussion of the various possible meanings of the "minimum core".



the reasonableness review analysis - that would facilitate the alleviation of poverty in a democratic developmental state through a collaborative, substantive interpretation of rights. The notion of a “minimum core” can emerge from the jurisprudence under the Court’s reasonableness review requirement that a reasonable government programme, at a minimum, cater for the urgent needs of vulnerable groups. This would be a starting point for the incremental substantive interpretation of socio-economic rights.

The South African Constitution does not specifically include a minimum core of socio-economic rights. However, based on South Africa’s international law commitments, commentators have argued that everyone should have the right to a minimum core of basic entitlements.<sup>486</sup> General Comment 3 of the CESCR, first laid out the minimum core obligation, and South Africa has now finally ratified the ICESCR.<sup>487</sup> General Comment 5 of the *Convention on the Rights of the Child* (‘CRC’), which has also been ratified by South Africa, states that General Comment 3 of the CESCR is complementary to the CRC.<sup>488</sup> Finally, the socio-economic rights provisions in the South African Constitution are very similar to the rights in the ICESCR and the CRC.

The Courts, however, have not been amenable to enforcing minimum core content of socio-economic rights. The Constitutional Court in *Grootboom*<sup>489</sup> considered General Comment 3 of the CESCR, which the *amici* used to argue for the minimum core of the right to access to adequate housing, but was lukewarm towards the minimum core

<sup>486</sup> D Bilchitz *Poverty and Fundamental Rights: The justification and enforcement of social and economic rights* (2007); S Rosa & M Dutschke “Child Rights at the Core: The use of international law in South African cases on children’s socio-economic rights” 22 (2006) *SAJHR* 224-260; K Creamer *The impact of South Africa’s evolving jurisprudence on children’s socio-economic rights on budget analysis*, IDASA (2002) 27; K Creamer “The implication of socio-economic rights jurisprudence for government planning and budgeting: The case of children’s socio-economic rights” (2004) 8 *Law Democracy and Development* 208-21, 218; Comments on the Social and Economic Rights in the Working Draft of the New Constitution (22 November 1995) 4; M Olivier “Constitutional perspectives on the enforcement of socio-economic rights: Recent South African experiences” (2002) 33 *VUWLR* 140; DA Horsten & L Jansen van Rensburg “The extent of justiciability of the socio-economic rights of children and the courts’ application of these rights” (2004) *Speculum Juris* 121-136.

<sup>487</sup> General Comment 3 of the CESCR para 10.

<sup>488</sup> Committee on the Rights of the Child Thirty-fourth session 19 September–3 October 2003 General Comment No. 5 (2003) “General measures of implementation of the Convention on the Rights of the Child” (arts. 4, 42 and 44, para. 6) para 5.

<sup>489</sup> *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) para 29, 32-33. It was argued in this case, that s 28 socio-economic rights are the minimum core of the more general, full blown socio-economic rights. The minimum core rights of children are constitutionally protected in s 28 while the minimum core rights of everyone have to be read in from international law.

approach. It said only that it could play a role in relation to the reasonableness of the programmes or policies, if the Court was able to obtain sufficient information. It explained that the practical difficulties and lack of information regarding the varying degree of needs in the country hampered its ability to determine the minimum core, nor did it possess the institutional competency to do so.<sup>490</sup> The Court also voiced its concern about the resources that would be required to provide everyone with access to a “core” service immediately.<sup>491</sup>

Similarly in *TAC*,<sup>492</sup> the Court overruled the conception that section 27(1) bestowed a distinctive positive right, not subject to the limitations in section 27(2). The Court reiterated that failure to fulfil minimum core needs would be taken into account in determining the reasonableness of the government programme.<sup>493</sup> In *Mazibuko*, the Court believed the litigants to be pursuing the minimum core argument yet again and became extremely defensive and irate despite the fact that the CALS lawyers stated firmly that they carefully constructed the litigants’ case around the *Grootboom* reasonableness test and were not seeking to argue for a minimum core for water.<sup>494</sup>

The cases that have ensued since the Court rejected the concept of the minimum core have followed the same course. Even though the Court has chosen not to adopt a minimum core approach under international law, it should still construct and define a core content of socio-economic rights or at least a substantive interpretation of what each right means and what it seeks to achieve.<sup>495</sup> That way, the State can progressively realise the qualified socio-economic rights over time. The net effect of the above cases is that the

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<sup>490</sup> Paras 32-33, 38. It is however, practically possible to ascertain needs amongst the poor in the country, at a very detailed, local level.

<sup>491</sup> Para 35.

<sup>492</sup> Submission of the Community Law Centre and Idasa *Amicus Heads of Argument TAC case* (April 2003) paras 14 and 23, p 181 (copy on file with author).

<sup>493</sup> *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) para 33; *Minister of Health v Treatment Action Campaign (No 2)* 2002 (10) BCLR 1033 (CC) para 34, 68.

<sup>494</sup> See J Dugard’s comment on P Danchin “A Human Right to Water? The South African Constitutional Court’s decision in the Mazibuko case” *European Journal of International Law* <<http://www.ejiltalk.org/a-human-right-to-water-the-south-african-constitutional-court’s-decision-in-the-mazibuko-case/>> (accessed 28-11-2016). COHRE’s amicus curiae intervention argued that a minimum core should be used in determining reasonableness rather than in place of the reasonableness standard.

<sup>495</sup> Liebenberg suggests an approach that is sufficiently flexible and yet defines the substance of socio-economic rights. See Liebenberg *Socio-Economic Rights* 163-203.

Court requires a reasonable government programme, at a minimum, to cater for the urgent needs of vulnerable groups. However, there are critical limitations to the Court's approach.

Firstly, under the reasonableness test there is no direct entitlement to a minimum core of the socio-economic right, except perhaps to emergency, temporary accommodation when faced with an eviction on public or private land. Either way, they must sit tight and wait.<sup>496</sup> Secondly, the Court did not elevate the issues of the claimants to be addressed as a matter of priority. The general comments of the CESCR suggest that the minimum core confers a higher standard of review for the non-fulfilment of minimum core rights.<sup>497</sup> In a democratic developmental state, this would accord with a greater degree of accountability for redress and progress on poverty reduction measures. Take for example the right to food, which is the only socio-economic right that has not yet been tested in the courts. If people are facing severe hunger and food shortages, should they wait for a reasonable policy or programme to be developed, or would they get priority in the form of emergency food parcels, similar to emergency housing?

Thirdly, the claimant bears the burden of having to prove that the government's programme is unreasonable. Litigants must review government's social policies, programmes and legislation within the national, provincial or local spheres of government, and assess the resources available to meet the relevant socio-economic needs. They must make the argument that the State's failure to meet their needs is unreasonable.<sup>498</sup> This is a very complex undertaking. If the courts were to adopt a minimum core inquiry, a *prima facie* violation could be established based on a lack of access to basic needs. The burden would then fall on the State to justify itself.<sup>499</sup>

From the perspective of a developmental state and participatory democracy, elucidating the normative content of socio-economic rights and delineating a minimum core is

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<sup>496</sup> S Liebenberg "South Africa's evolving jurisprudence on socio-economic rights: an effective tool in challenging poverty?" (2002) *Law, Democracy and Development* 159, 176.

<sup>497</sup> UN CESCR General Comment 3 para 10.

<sup>498</sup> Liebenberg *Law, Democracy and Development* 177.

<sup>499</sup> Liebenberg *Law, Democracy and Development* 177.

desirable. The questions are: Who should do it and how should it be done? What is useful about reasonableness review is that it enables a Court to elaborate on the expansive meaning of socio-economic rights, but then to adopt a very context-sensitive assessment of what it is reasonable to require of particular organs of state, given the constitutional commitment to the full realisation of the rights and taking into account current resource and institutional constraints, in the case of qualified rights. In the *Mazibuko* case, for example, the Constitutional Court had all the necessary evidence before it and the participation of all the relevant people, to warrant a conclusion that 25 litres of water per person a day was unreasonable, and remedy the situation as the High Court and Supreme Court had done, by facilitating an agreement on a higher minimum requirement per person.

A version of the minimum core that facilitates or enables participation in the determination of substantive content is possible, and would advance the objectives of the democratic developmental state and transformative constitutionalism. The Court would still have to respond to the critique of separation of powers, but could justify its position by re-conceptualising the role of the courts as facilitating the inclusive participation of all relevant role-players through judicial forums and remedies. The actual minimum core content, in the immediate context of the case before the court, would be mediated through a collaborative engagement between policy-makers, non-government organisations and affected communities and supervised by the courts. The court could request reports on the research and views of the various parties to the litigation, including amicus and other state organs it might want to join the case, during the review stage.<sup>500</sup> It would then facilitate agreement amongst the parties on the substantive content of the minimum core of the right, in the circumstances of the particular case and taking into account the historical situation and the means to achieve socio-economic

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<sup>500</sup> See *Daniels v Scribante* 2017 (8) BCLR 949 (CC); *Occupiers of Erven 87 and 88 Berea v De Wet* (CCT108/16) [2017] ZACC 18 (8 June 2017); *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) BCLR 1 (CC); *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 (6) BCLR 641 (CC); *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2015 (6) BCLR 653 (CC); *Black Sash Trust v Minister of Social Development* [2017] ZACC 8; 2017 (5) BCLR 543 (CC) and ZACC 20; 2017 (9) BCLR 1089 (CC).

developmental outcomes. At the remedial stage, the court would monitor the implementation of the agreement.<sup>501</sup>

It is envisaged that the delineation of the minimum core content would then also provide a basis for systemic improvement of conditions of other disadvantaged and vulnerable people in similar situations. This “democratisation” of the courts would not seek to usurp the role of the executive or the legislature, but facilitate collaborative and participatory forums for the various relevant parties to decide on the constituent elements of the minimum core content of a socio-economic right.

#### **4 6 Participatory dimensions of socio-economic rights jurisprudence**

The purpose of constitutional remedies is to provide effective relief to those who have experienced a violation of their rights, and also to deter future violations.<sup>502</sup> If the transformative intent of the Constitution is to have a broader impact on our society beyond redress for actual litigants, strategies to systemically address the underlying causes of poverty and inequality are required. Such strategies must challenge the structural rules that serve to entrench socio-economic disempowerment of the poor and disadvantaged in our society.<sup>503</sup> The Courts have also highlighted this broader purpose in needing to develop effective, far-reaching and creative remedies and to “forge new tools”, where necessary, in constitutional rights cases, principally socio-economic rights cases.<sup>504</sup> In a country where few people have the resources to enforce their socio-economic rights through the legal process, the courts have a specific responsibility to ensure that infringement of rights is effectively asserted and remedial action taken swiftly and systemically.

The courts in responding to socio-economic rights violations, should promote the notions of participatory and deliberative democracy through the wide range of remedial options

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<sup>501</sup> See discussion below on structural remedies in 4 6 6.

<sup>502</sup> Liebenberg *Socio-Economic Rights* 378-461, 378.

<sup>503</sup> Liebenberg *Socio-Economic Rights* 379.

<sup>504</sup> Cameron JA in *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza* 2001 (10) BCLR 1039 (SCA) paras 11-12. Quoted in Liebenberg *Socio-Economic Rights* 379.

available under the Constitution. This would result in not only effectively altering the material causes of poverty, but also catalysing an opportunity for empowerment of the poor by changing the underlying power dynamics between the state and citizens, as envisaged in a democratic developmental state. The courts' use of participatory and transformative remedies, such as "meaningful engagement" and structural remedies, will contribute to achieving this ultimate purpose. This is particularly evident in the jurisprudence on evictions, social security and education, upon which I will focus in this section.

#### 4.6.1 Constitutional remedies in socio-economic rights cases

Section 172(1) of the 1996 Constitution provides that, "[w]hen deciding a constitutional matter within its power, a court ... (b) may make any order that is *just and equitable*". In addition, section 38 of the Constitution provides that anyone with standing in terms of this section "has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened", and confers on courts the power to grant "appropriate relief, including a declaration of rights". In theory, these provisions give the Constitutional Court scope to develop innovative remedies for the enforcement of constitutional rights, especially pro-poor rights.<sup>505</sup> In an *obiter* judgment in *Zulu v eThekweni Municipality*<sup>506</sup> ("Zulu"), Van der Westhuizen J declared the interim eviction order against the applicants invalid. He emphasised the power of the Court granted by the Constitution to make any order that is "just and equitable" in order to achieve "justice and equity" for litigants.<sup>507</sup> This is more important than "strict adherence to technical procedures" because a flexible remedial jurisdiction allows the Court to "scratch the surface to get to the real substance below".<sup>508</sup>

In the very recent case of *Occupiers of Erven 87 and 88 Berea v De Wet* ("Occupiers Berea"), the Constitutional Court held that the High Court had been remiss in not

<sup>505</sup> T Bollyky "R if C > P + B: A paradigm for judicial remedies in socio-economic rights violations" (2002) 18 *SAJHR* 161-200.

<sup>506</sup> 2014 (8) BCLR 971 (CC).

<sup>507</sup> Para 62.

<sup>508</sup> Para 62.

conducting a proper enquiry into all the relevant facts of the case. It stated that the High Court had “failed to appreciate that the duty to conduct the enquiry is that of the court, which is obliged to be *proactive* in gathering information about all the relevant circumstances, considering that information and arriving at a just and equitable order in the circumstances of each case.” [own italics]<sup>509</sup> The Constitutional Court went on to make an order to rescind the eviction and remit the matter to the High Court of South Africa, Gauteng Local Division, with the direction that the matter be case-managed and dealt with expeditiously. It joined the City of Johannesburg as a respondent to the matter and gave clear directions for reporting to the High Court within 30 days on the steps it had taken and steps it intended to take in order to provide alternative land or emergency accommodation to the applicants in the event of their being evicted, as well as when the alternative land or accommodation would be provided.

What this and other eviction cases have failed to address, is what happens to the litigants after the provision of emergency accommodation. Without a substantive interpretation of the content of the right to housing and what that means in the context of evictions, the litigants remain in a state of limbo and no systemic, sustainable solution to the problem is ever debated or implemented. In the presence of these powers, the Courts have over the years fashioned some creative and participatory remedies for poor communities to realise their socio-economic rights. However, at the same time, I have argued above that socio-economic rights litigation aimed at advancing the rights of the poor has resulted in somewhat limited relief over the past two decades<sup>510</sup> and requires an augmented, proactive and participatory approach by the courts in a democratic developmental state, to bring about the systemic socio-economic transformation required.

In *Soobramoney*, where the Court found that the right not to be refused emergency medical treatment did not extend to renal dialysis, no relief was granted to the applicant,

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<sup>509</sup> 2017 (5) SA 346 (CC) paras 52-57.

<sup>510</sup> See generally Liebenberg *Socio-Economic Rights* Chapter 8. See also K Pillay *Addressing Poverty through the Courts: How have we Fared in the First Decade of Democracy?* Unpublished paper presented at a Conference on *Celebrating a Decade of Democracy* in Durban, 23-25 January 2004 (on file with author)



who died of kidney failure shortly after the judgment.<sup>511</sup> In *Grootboom*, a declaratory order was granted requiring the state to meet its obligations under section 26(2) of the 1996 Constitution to “devise and implement within its available resources a comprehensive and coordinated [housing] program”. Such a programme, the Court continued, should “include reasonable measures such as ... [the provision of] relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions of crisis situations”. Although remarking in passing that the South African Human Rights Commission (one of the *amici curiae* in the case) would monitor and report on the state’s progress in complying with the judgment, the Court did not incorporate this oversight function in its order.<sup>512</sup>

In *TAC*, the Pretoria High Court had granted a structural interdict requiring the government to revise its policy regarding the prevention of mother-to-child transmission of HIV/AIDS and to submit the revised policy to the court.<sup>513</sup> Whilst deciding in favour of the claimant, the Constitutional Court considered a structural interdict to be inappropriate, and instead granted an order declaring government policy to be unreasonable, coupled with a mandatory order directing that the restrictions on the use of a particular antiretroviral drug outside of selected research sites be removed, and that the drug be made available at all public hospitals and clinics. Since then the Constitutional Court has used structural interdicts more often in socio-economic rights cases, as in *Occupiers Berea*, but it has not been without its challenges.<sup>514</sup>

In *Khosa*, the remedy chosen by the Court was to provide a “reading in” remedy for sections of the Social Assistance Act and other legislation and regulations, so as to allow permanent residents the same social assistance benefits as South African citizens.<sup>515</sup> Permanent residents were thus immediately entitled to social assistance benefits. In spite of the power given to the Court to fashion appropriate relief, in four out of the five earlier

<sup>511</sup> *Soobramoney v Minister of Health (Kwazulu-Natal)* 1997 (12) BCLR 1696 (CC).

<sup>512</sup> *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) para 97.

<sup>513</sup> *Minister of Health v Treatment Action Campaign (No 2)* 2002 (10) BCLR 1033 (CC) para 129.

<sup>514</sup> Discussed further in 4.6.6 below.

<sup>515</sup> *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) BCLR 569 (CC) para 98.

cases where the Court considered the state's positive obligations vis-à-vis particular socio-economic rights, it refused relief in the one case where a person sought a direct remedy (*Soobramoney*) and, in the other three cases, mandated that the applicable government policy be changed, without, however, granting direct relief to the affected individuals.

On the other hand, in a number of the later cases, the relief granted by the Constitutional Court directly to the affected individual litigants has been more favourable (albeit not systemic) and procedurally based.<sup>516</sup> In *Joseph v City of Johannesburg*<sup>517</sup> ("Joseph") the termination of electricity to the occupants of a building was declared unlawful due to procedural lapses and the court ordered the electricity to be reconnected immediately. In *Hoërskool Ermelo* the learners were allowed to remain at the school and the Court ordered the School Governing Body ('SGB') to review the language policy in line with the Constitution, also on the basis of procedural lapses.<sup>518</sup> For the benefit of the broader disadvantaged community, the Constitutional Court ordered the Head of the Department of Education ('HOD') to review the numbers of students that would need places in Grade 8 and make provision for them in the 2010 school year.<sup>519</sup> The SGB and the HOD were also ordered to report back to the Court by a particular date on their policy decisions.<sup>520</sup> This was the first supervisory order of the Constitutional Court in a socio-economic rights matter.

The Court activated a constructive remedy in a wave of socio-economic rights cases from 2008 onwards, in particular in relation to eviction, basic services and education cases,<sup>521</sup> in

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<sup>516</sup> In *Nokotyana v Ekurhuleni Metropolitan Municipality* 2010 (4) BCLR 312 (CC) the Court merely ordered the Member of the Executive Council for Local Government and Housing to make a final decision on the Ekurhuleni Municipality's application to upgrade the status of the Harry Gwala Informal Settlement, within 14 months of the date of the order.

<sup>517</sup> 2010 (3) BCLR 212 (CC) para 87.

<sup>518</sup> *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (3) BCLR 177 (CC) para 106.

<sup>519</sup> Para 106.

<sup>520</sup> Para 106.

<sup>521</sup> *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC); *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (5) BCLR 475 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 (9) BCLR 847 (CC); *Joseph v City of Johannesburg* 2010 (3) BCLR 212 (CC) para 64; *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (3) BCLR 177 (CC); *Head of Department, Department of Education, Free State Province v Welkom High School*; *Head of Department, Department of Education, Free State Province v*

the form of a mandatory order requiring the parties involved to “engage meaningfully” with the purpose of reaching a “mutually satisfactory and specific resolution to the issues in dispute”.<sup>522</sup> These types of remedies can facilitate the participatory and deliberative values of the Constitution as envisaged in a democratic developmental state. But they must do so in such a way that the rights themselves are capable of being realised by giving content as well as form to them so as to ensure that other persons living in similar conditions of poverty may also benefit. This systemic impact on socio-economic transformation can be achieved through empowering affected litigants and communities by their participation in solving social policy challenges. The following section analyses the potential of this remedy in more depth, to further strengthen democratic court to proactively engage in experimentalist and managerial review.

#### 4.6.2 “Meaningful engagement”: Purpose and requirements

Neither section 26(2) of the Constitution nor the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (‘PIE Act’)<sup>523</sup> expressly require “meaningful engagement”. The requirement is an innovation made applicable initially in eviction cases by the judgments of the Constitutional Court in *Olivia Road* and *Joe Slovo*, to assess the *reasonableness of measures taken by the State* when implementing housing policy and law. The Court in these cases held that “meaningful engagement” is not only required by section 26(2) of the Constitution but is also mandated in all evictions sought in the context of housing development under the PIE Act.<sup>524</sup> It is clear that owners and

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*Harmony High School* 2013 (9) BCLR 989 (CC) and *MEC for Education in Gauteng Province v Governing Body of Rivonia Primary School* 2013 (12) BCLR 1365 (CC); *Federation of Governing Bodies for South African Schools v Member of the Executive Council for Education, Gauteng* 2016 (8) BCLR 1050 (CC); *Daniels v Scribante* 2017 (8) BCLR 949 (CC).

<sup>522</sup> Liebenberg *Socio-Economic Rights* 423.

<sup>523</sup> The Act is intended to provide for the prohibition of unlawful eviction; to provide for procedures for the eviction of unlawful occupiers; and is intended to give effect to s 26(3) of the Constitution.

<sup>524</sup> See *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) paras 84 and 87; *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC) paras 39-45; *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (5) BCLR 475 (CC) paras 15-7; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 (9) BCLR 847 (CC) paras 115-7; and *Abahlali Basemjondolo Movement SA v Premier of the Province of Kwazulu-Natal* 2010 (2) BCLR 99 (CC) para 69. See also recent cases: *South African Informal Traders Forum v City of Johannesburg*; *South African National Traders Retail Association v City of Johannesburg* 2014 (6) BCLR 726 (CC); *Zulu v eThekweni Municipality* 2014 (8) BCLR 971 (CC); *MC Denneboom Service Station CC v Phayane* 2014 (12)

municipalities can evict only in terms of the PIE Act. This means that all applicants for eviction must comply with the requirements expressly stipulated in the PIE Act and the Constitution as well as with all other judicially specified requirements.

Sachs J in *Port Elizabeth Municipality v Various Occupiers*<sup>525</sup> (“PE Municipality”) remarked that PIE allows for the interaction between the foundational values of the rule of law and the attainment of equality. The Court is required then to “engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process”.<sup>526</sup> This was reiterated recently in *Molusi v Voges NO*<sup>527</sup> (“Molusi”) in relation to the Extension of Security of Tenure Act 62 of 1997 (‘ESTA’). In *PE Municipality* the municipality sought a ruling that it was not constitutionally obliged to find alternative accommodation or land when seeking to evict unlawful occupiers. The Court rejected this argument, finding that in most circumstances a municipality would be obliged to procure a mediated solution and provide alternative accommodation or land *before* an eviction could be executed.<sup>528</sup> This decision provided concrete benefits to poor people in this case and future cases, in as much as municipal evictions may no longer proceed without a proper plan for relocation to alternative, emergency accommodation.

As per the Court’s judgments in *Joe Slovo*<sup>529</sup> and *Abahlali Basemjondolo Movement SA v Premier of the Province of KwaZulu-Natal*<sup>530</sup> (“Abahlali”), it is clear that all applicants for eviction must engage reasonably *before* instituting eviction proceedings as well as during the process.<sup>531</sup> Commentators have pointed out that the orders in *Olivia Road* and *Joe Slovo* differ in relation to the timing and issues of engagement. In *Olivia Road*, the Court ordered the parties to engage *before* an eviction order could be granted, and in *Joe Slovo*, engagement was required regarding the nature of the alternative accommodation and

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BCLR 1421 (CC); and *Ngaka Modiri Molema District Municipality v Chairperson, North West Provincial Executive Committee* 2015 (1) BCLR 72 (CC).

<sup>525</sup> 2004 (12) BCLR 1268 (CC).

<sup>526</sup> Paras 35-6.

<sup>527</sup> 2016 (7) BCLR 839 (CC) para 31.

<sup>528</sup> *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC) paras 39-45.

<sup>529</sup> *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 (9) BCLR 847 (CC).

<sup>530</sup> 2010 (2) BCLR 99 (CC).

<sup>531</sup> See Centre for Applied Legal Studies (CALS) *Meaningful Engagement Workshop Report* (December 2009) 35-36. Unpublished. On file with the author.

relocation, rather than the decision to evict itself.<sup>532</sup> Wilson warns that “meaningful engagement could remain a procedural condition to be satisfied before an inevitable eviction order is sought and obtained”.<sup>533</sup> As a result of the process of engagement, the property could possibly be upgraded without the eviction of the unlawful occupiers. This is because it would not be acting reasonably in the engagement process. The Court in *Abahlali* asserted that proper engagement in circumstances of potential eviction should be undertaken with people who are to be evicted, in order to ascertain: whether the areas where they live could be upgraded *in situ*; the provision and location of alternative accommodation; and the manner of and timeframes for eviction.<sup>534</sup> In ideal circumstances, the engagement would be meaningful when used as a negotiation method between the parties both to determine whether or not eviction is “just and equitable” in order to implement the policy of the government, as well as to iron out the consequences if eviction is unavoidable in order to “progressively realise” the right to housing.<sup>535</sup> The former and the latter could then be made an order of court and implemented.

Where they work to the benefit of all parties concerned, litigants, civil society organisations, lawyers and government have welcomed engagement orders alike. Their value in facilitating participatory and deliberative democratic processes and empowerment of those affected by poverty is widely acknowledged.<sup>536</sup> As Wilson notes, “meaningful engagement” provides a space for negotiation for poor people, social movements and public interest lawyers. It can be a process through which substantive claims to land and housing can be defined and implemented for specific groups of people, together with the state. In *Olivia Road* (and all those similarly situated), the Court did not

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<sup>532</sup> CALS *Meaningful Engagement*.

<sup>533</sup> CALS *Meaningful Engagement* 36. See also S Wilson “Breaking the Tie: Evictions, homelessness and the new normality” (2009) 126(2) *South African Law Journal* 270-290.

<sup>534</sup> *Abahlali Basemjondolo Movement SA v Premier of the Province of Kwazulu-Natal* 2010 (2) BCLR 99 (CC) para 114.

<sup>535</sup> See G Muller “Conceptualising ‘meaningful engagement’ as a deliberative democratic partnership” (2011) 22 *Stellenbosch Law Review* 742-758 on different forms of citizens’ engagement; See a critique of the way in which “meaningful engagement” was applied in different cases in S Liebenberg “Engaging the Paradoxes” *African Human Rights Law Journal* 12(1) (2012) 1-29.

<sup>536</sup> CALS *Meaningful Engagement*.

provide a specific set of benefits, but a space for discussion and negotiation towards protecting and achieving such benefits.<sup>537</sup>

The Court has also interestingly encouraged engagement in non-eviction related cases, for example in *Joseph* where the City committed to “engaging with the applicants” regarding the termination of electricity supply and the Court welcomed this.<sup>538</sup> Similarly the Court has held in the various education cases that a language policy,<sup>539</sup> learner pregnancy policy<sup>540</sup> and admissions policy<sup>541</sup> adopted by individual schools infringed the constitutional rights of learners to human dignity, to freedom from unfair discrimination and to receive a basic education. The schools were ordered to review their policies in light of the requirements of the Constitution, the Schools Act and to engage meaningfully with the HOD in the process of reviewing the policies.

The education cases have also served to highlight the important participatory democratic role of school governing bodies, as elected representatives of schools, in determining the content of school policies and ensuring that they comply with the constitutional right to access education, including quality education. In the recent *FEDSAS* case,<sup>542</sup> the Court upheld Gauteng regulations related to admissions of learners and held that they did not contradict the power of school governing bodies to determine admissions policies for schools. The gist of the judgment supported the attempts by the Gauteng Education Department to make quality education equitably accessible.

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<sup>537</sup> Wilson SALJ.

<sup>538</sup> *Joseph v City of Johannesburg* 2010 (3) BCLR 212 (CC) para 64. See also *Mamba v Minister of Social Development* Case No 36573/08 (T) (unreported judgment of 12 August 2008 and Order dated 21 August 2008). The case concerned refugees who opposed the closure of refugee camps by the Gauteng government during the xenophobic violence in 2008. The Constitutional Court issued an engagement order directing the parties to meaningfully engage with one another and with other stakeholders and to come up with a plan for reintegration and alternative accommodation before closure of the camps on 30 September 2008, however the order was not complied with. See discussion of this case in Liebenberg *Socio-Economic Rights* 422; and B Ray *Engagement's Possibilities and Limits as a Socio-economic Rights Remedy* 9 Wash. U. Global Stud. L. Rev. 399 (2010) <[http://openscholarship.wustl.edu/law\\_globalstudies/vol9/iss3/2](http://openscholarship.wustl.edu/law_globalstudies/vol9/iss3/2)> (accessed 07-09-2016).

<sup>539</sup> *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (3) BCLR 177 (CC).

<sup>540</sup> *Head of Department, Department of Education, Free State Province v Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School* 2013 (9) BCLR 989 (CC).

<sup>541</sup> *MEC for Education in Gauteng Province v Governing Body of Rivonia Primary School* 2013 (12) BCLR 1365 (CC).

<sup>542</sup> *Federation of Governing Bodies for South African Schools v Member of the Executive Council for Education, Gauteng* 2016 (8) BCLR 1050 (CC).



When the Court orders engagement between the executive arm of government and the affected litigant communities, it plays a facilitatory, collaborative role amongst the various competing interests, whilst ensuring that the outcomes of such engagement serve to further socio-economic rights. This is the kind of “aggressive weak-form” remedy that David Landau says is required to spur political action towards the co-design of socio-economic policy.<sup>543</sup> This balancing, participatory and proactive role for the courts fits well with the notion of the democratic developmental state where all public institutions are responsible for socio-economic transformation. “Meaningful engagement” as a remedy requires interaction between all the parties to a case, especially where there are opposing interests as in the case between landowner and resident or learner and school. It is a participatory tool that the courts in a democratic developmental state can utilise to determine, in a cooperative manner between state and citizens, or citizens amongst themselves, the substantive content of a socio-economic right and the process for the practical realisation thereof.<sup>544</sup>

#### 4 6 3 Substantive rights and systemic solutions

Tissington and Liebenberg raise concerns about the limited impact these orders can have when they resolve only the practical issues in the case before the court, and not the broader systemic issues, which may equally affect other similarly situated groups and usually fall within the realm of policy.<sup>545</sup> This is also the challenge for a democratic developmental state, which has to transform poverty and inequality experienced by millions of people, as described in chapter 3, in a sustainable and long-term manner. In the absence of substantive analysis of the constitutional rights and duties of the parties, “context-specific negotiated orders” may not benefit others who are not party to the litigation.<sup>546</sup> Liebenberg suggests that one way to resolve this is through judgments

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<sup>543</sup> D Landau “Aggressive weak-form remedies” CCR 244.

<sup>544</sup> Section 38 Superior Courts Act 10 of 2013 allows the courts to appoint a fact-finding commission or referee to address the factual disputes and report back to the Court.

<sup>545</sup> K Tissington “Challenging Inner City Evictions before the Constitutional Court of South Africa: The *Occupiers of 51 Olivia Road* case in Johannesburg, South Africa” (2008) 5(2) *Housing and ESC Rights Law Quarterly* 1, 3–6. Quoted in Liebenberg *Socio-Economic Rights* 421-422.

<sup>546</sup> Liebenberg *Socio-Economic Rights* 423.



“which illuminate the relevant legal principles and their application to similar cases” through “a substantive interpretation of the relevant rights and their implications”.<sup>547</sup> This way, public authorities and the broader public then know what the rights mean in similar situations in order that they can act accordingly. It should also nullify the need for any further litigation on similar issues, by other disadvantaged groups. It is a form of judicial “policy-making”, with which some commentators are uncomfortable, but which I argue is a form of necessary judicial “precedent-setting”.

Liebenberg argues that in order for engagement orders to “constitute appropriate and effective relief for violations of constitutional rights”<sup>548</sup> for disadvantaged groups, the rights involved must be given substance and content. Devoid of content, rights become somewhat meaningless as guiding norms for state action, and instead the focus is placed on the process of “meaningful engagement” alone. In this way, the negotiating power of disadvantaged groups in relation to their constitutional rights may be diminished in the face of more powerful state-players and require ongoing court challenges on similar issues. This would obviously be a waste of time and resources on the part of litigants and courts. In *PE Municipality* the Court emphasised the necessity for the courts to “balance competing interests in a principled way and to promote the constitutional vision of a caring society based on good neighbourliness and shared concern.”<sup>549</sup> The Court went on to state that it is not for the judiciary to correct all the systemic unfairness that exists in society but that it can “soften and minimise the degree of injustice and inequity which the eviction of the weaker parties in conditions of inequality of necessity entails.”<sup>550</sup>

More recent Constitutional Court judgments have increasingly begun to show signs of substantive interpretation of rights that can serve to guide and ameliorate the conditions of poor people in similar situations. In *FEDSAS*, the right to education and the right not

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<sup>547</sup> Liebenberg *Socio-Economic Rights* 423-424.

<sup>548</sup> Liebenberg *Socio-Economic Rights* 424.

<sup>549</sup> *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC) para 37.

<sup>550</sup> Para 38.

to be unfairly discriminated against, was vividly elucidated by Mosenek J.<sup>551</sup> In *Molusi*, the issue related to the application of ESTA to a tenant who was being evicted, in giving effect to section 26(3) of the Constitution.<sup>552</sup> The Court said that although the correct procedures were followed, the applicant's situation was not taken into account and the application for eviction in the Land Claims Court was dismissed. The Court demonstrated an appreciation of the plight of the applicants in the context of apartheid-era land law and common-law that that entrenched "unfair patterns of social domination and marginalisation of vulnerable occupiers in eviction cases".<sup>553</sup> The Court held that the land reform legislation – ESTA – now requires a balancing of opposing interests between landowner rights and people desperate without land or accommodation. "A court making an order for eviction must ensure that justice and equity prevail in relation to all concerned..."<sup>554</sup>

In the recent case of *Daniels*, the five separate judgements of the court also went into much detail about the plight of people dispossessed of land during colonial and apartheid times and the need to remedy the situation over time, with careful consideration of the rights to property and security of tenure.<sup>555</sup> These examples of a more substantive interpretation of rights in socio-economic cases, along with a structural and longer-term perspective, provide promise towards guiding norms for state and private action beyond the immediate case before the courts. The need for municipalities to plan, budget and provide alternative accommodation for people about to be evicted from private or public land; the principled guidance given to SGBs with respect to the content of school policies towards quality education for all; and the broader entitlement to basic services such as electricity, as a component of the right to housing, are all significant steps in this direction. The participatory methods by which the substance of rights is derived, delineated and delivered, is also characteristic of a democratic developmental state.

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<sup>551</sup> *Federation of Governing Bodies for South African Schools v Member of the Executive Council for Education, Gauteng* 2016 (8) BCLR 1050 (CC) paras 1-3.

<sup>552</sup> *Molusi v Voges NO* 2016 (7) BCLR 839 (CC).

<sup>553</sup> Para 39.

<sup>554</sup> Para 39.

<sup>555</sup> *Daniels v Scribante* 2017 (8) BCLR 949 (CC).

#### 4 6 4 Obligation of the state to negotiate solutions in private evictions

A number of cases that have become before the High Court, the Supreme Court of Appeal and subsequently the Constitutional Court, have established an obligation on the State to address the situation of poor people facing homelessness in private eviction applications.<sup>556</sup> It is important in a democratic developmental state for the courts to ensure, through participation and deliberation, that the State takes responsibility for redistributive justice and balancing competing constitutional rights in the context of widespread poverty, vulnerability and private interests.

In *Lingwood*, the Judge held that the obligation to provide access to adequate housing or suitable alternative accommodation for homeless people or unlawful occupiers threatened with eviction, fell on the State and municipalities.<sup>557</sup> Furthermore, the judge highlighted the comments of Sachs J in the *PE Municipality* case where he “stressed the necessity and importance of parties involved in litigation under PIE to engage in mediation in an endeavour to achieve mutually acceptable solutions”.<sup>558</sup> In this case, the judge found that the parties never engaged in any negotiations, including mediation, in an attempt to finding mutually acceptable solutions. All the parties (including the City of Johannesburg who was joined in the proceedings) were thus ordered to take all reasonable steps to achieve a mediated solution.<sup>559</sup>

In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*<sup>560</sup> (“*Blue Moonlight*”), the leading case on private evictions, a group of 81 adults and five children faced eviction by a private landowner that sought to redevelop the property

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<sup>556</sup> See *Lingwood and Another v Unlawful Occupiers of R/E ERF 9 Highlands* 2008 (3) BCLR 325 (W); *Blue Moonlight Properties v the Occupiers of Saratoga Avenue and Others* 2009 (1) SA 470 (W); *Occupiers of Erf 101, 102, 104 and 112 Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd* 2010 (4) BCLR 354 (SCA) (*‘Shorts Retreat’*); *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville v Mark Lewis Steele* 2010 (9) BCLR 911 (SCA). See also the recent cases *Molusi v Voges* NO 2016 (7) BCLR 839 (CC); *Pitje v Shibambo* 2016 (4) BCLR 460 (CC); *Daniels v Scribante* 2017 (8) BCLR 949 (CC); *Occupiers of Erven 87 and 88 Berea v De Wet* (CCT108/16) [2017] ZACC 18 (8 June 2017). See also S Liebenberg “Socio-economic rights beyond the public/private divide” in M Langford et al *Symbols and Substance* (2013).

<sup>557</sup> *Lingwood and Another v Unlawful Occupiers of R/E ERF 9 Highlands* 2008 (3) BCLR 325 (W) para 20.

<sup>558</sup> Para 33.

<sup>559</sup> Paras 37-38.

<sup>560</sup> 2012 (2) BCLR 150 (CC).

where they lived. The issues presented in *Blue Moonlight* involved the extent to which section 26 of the Constitution obligates a private landowner to allow people to continue to occupy land where evicting them would result in homelessness; the interaction between the right to housing in section 26 and the protection of private property in section 25; the rights of the occupiers and the landowner against the municipality; and the obligation on the government to provide emergency housing to citizens facing eviction from private land.

The Court established the principle that private landowners have a limited obligation to allow occupiers to remain on land where evicting them would cause homelessness. It also articulated that the municipality couldn't rely on a lack of resources as a defence where that lack was the result of an incorrect interpretation of its statutory obligations to provide housing. The court held that at the very least, the City of Johannesburg was required to provide emergency accommodation to people who would be rendered homeless by the eviction – “[t]he City has a duty to plan and budget proactively for situations like that of the occupiers”.<sup>561</sup> The Court quoted *Grootboom* in support of the finding that the proactive “duty regarding housing in section 26 of the Constitution falls on all three spheres of government – local, provincial and national – which are obliged to co-operate”.<sup>562</sup>

This principle has also been applied to another private eviction case related to the right to education.<sup>563</sup> In the case of *Juma Masjid*, an application for leave to appeal was made against the decision of the KwaZulu-Natal High Court. The order of the High Court authorised the eviction of a public school conducted on private property. The dispute was between the Juma Masjid Trust (Trust), the owner of the private property, and the Member of the Executive Council for Education for KwaZulu-Natal (MEC) as well as the School Governing Body (SGB). The impasse arose when the MEC failed to conclude an agreement as required by certain provisions of the South African Schools Act (Act) setting

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<sup>561</sup> Para 67.

<sup>562</sup> Para 57.

<sup>563</sup> *Governing Body of the Juma Masjid Primary School and Another v Ahmed Asruff* Essay NO 2011 (8) BCLR 761 (CC).

out the tenancy terms and conditions. The standoff culminated in a successful eviction claim by the Trust in the High Court. This was followed by an unsuccessful attempt to appeal to the Supreme Court of Appeal.<sup>564</sup>

In this case, the Constitutional Court found that the High Court should not have made an order for eviction, because the order had an impact on the learners' right to a basic education under section 29(1) of the Constitution and on the learners' best interests under section 28 of the Constitution. Nkabinde J stated that the High Court ought to have required the MEC to provide it with information regarding the steps she had taken to ensure that the learners would have schools at which they would be enrolled for the 2011 academic year. As this had not happened, the order of the High Court was set aside and the provisional order dated 7 September 2010 was made. The provisional order required the MEC and the Trustees to endeavour to conclude a section 14 agreement in terms of the Act which might have rendered the application for eviction unnecessary and saved the school from closure.<sup>565</sup>

Once it became clear to the Court that pursuant to the provisional order, the closure of the school had become inevitable and the dispute remained unresolved, the Trustees applied for an eviction order. On 25 November 2010 a further order was made, which was designed to ensure that the MEC complied with his obligation to provide information on alternative schooling for the children.<sup>566</sup> Finally, upon considering the reports and further information furnished as a result of the order of 25 November 2010, the Court was satisfied that the Trustees had made out a case for eviction and that satisfactory arrangements had been made by the MEC to ensure that all learners would be accommodated at other schools during the 2011 school-year. Accordingly, on 10 December 2010 the Court granted an eviction order.<sup>567</sup>

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<sup>564</sup> Para 1.

<sup>565</sup> Para 3.

<sup>566</sup> Para 4.

<sup>567</sup> Para 5.

Broadly, this case involved balancing competing rights: the right to a basic education on the one hand and property rights on the other.<sup>568</sup> What is interesting about this case in relation to “meaningful engagement”, is that the Court required the parties to resolve the issues between them as per two orders of the Court, firstly before the eviction was decided upon, and then in relation to the consequences of the eviction, in order ultimately to protect the right of the children to basic education. Nkabinde J explained that the Court provisionally set aside the eviction order by the High Court in order for the MEC, the Trustees and the SGB to engage meaningfully on the matter and discuss options for securing alternative placement for the learners, in line with their right to basic education.<sup>569</sup>

The Court in this case took care to examine the nature, content, substance and purpose of the right to education, in the context of international law, as well as in the context of a South Africa where the right to education was prejudiced under apartheid.<sup>570</sup> Nkabinde J, in quoting the Committee on Economic, Social and Cultural Rights, General Comment 13, stressed the importance of the right to education as an “empowerment right... by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.”<sup>571</sup>

In the eviction and education cases discussed above, the courts have established an obligation on the State to address the situation of poor people facing homelessness in private evictions and learners whose public schools are located on private land facing closure. The requirement for “meaningful engagement” between vulnerable individual citizens and private interests, overseen by the State, is a fundamental tenet of our horizontally applicable, transformative constitution and a participatory democracy. This is particularly important in the context of poverty where there is a severe imbalance in power between the wealthy and the poor. Vulnerable, poor people can thus be

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<sup>568</sup> Para 7.

<sup>569</sup> Para 74.

<sup>570</sup> Paras 36-44.

<sup>571</sup> Para 41.

empowered to negotiate the terms of their own survival and development, with support of the courts.

#### 4 6 5 Transformative “meaningful engagement” in a democratic developmental state

In a democratic developmental state, executive and administrative structures need to incorporate “meaningful engagement” training and actual “meaningful engagement” in their policy development processes and throughout the design and implementation of programmes. The government is duly obligated and therefore needs to be equipped to engage well before litigation is a possibility, in relation to the design and delivery of socio-economic rights.<sup>572</sup>

“Meaningful engagement” processes also encourage transparency and accountability. In *Olivia Road* the Court ordered the government to keep a public record of each engagement so that the courts could later review the outcome as well as the process of engagement. Emphasising that “secrecy is counter-productive to the process of engagement”, the Court stated “the provision of a complete and accurate account of the process of engagement including at least the reasonable efforts of the municipality within that process would ordinarily be essential”.<sup>573</sup> Courts are then empowered to review whether in fact meaningful engagement has taken place between the city and the resident who may be rendered homeless.<sup>574</sup> This is essential for accountable, transparent and participatory governance, in a democratic developmental state.

Brian Ray discusses the engagement remedies in three cases - *Olivia Road*, *Mamba* and *Joe Slovo* - and argues that the usefulness of the engagement orders of the court differed considerably in the three instances for a variety of reasons. He noted that there was a distinct lack of trust between the government and the citizens; there was a top-down approach versus a partnership in finding solutions; there were differing degrees of control

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<sup>572</sup> See Ray *Engagement's Possibilities and Limits*.

<sup>573</sup> *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (5) BCLR 475 (CC) para 21.

<sup>574</sup> Para 22.



exercised by the courts; and differing political will on the part of government.<sup>575</sup> He distinguishes between these cases as examples of “litigation engagement” (engagement which takes place at the behest of litigation as a “remedy-management” tool), and supports and promotes his preferred form of engagement, “political engagement”, as a more systematic form of public participation in government policy development processes. This is the method that he thinks the Courts will most likely develop further and which has the most potential for “transforming engagement into an effective tool for socio-economic rights enforcement”.<sup>576</sup> He compares it to the standard role that courts have taken for decades in the US, in large structural-reform cases, and argues for different and appropriate roles for the courts and the other arms of government. He states that remedies like engagement mostly rely on the political branches and citizens themselves, not the courts, to develop the provisions of the remedy. This turns the constitutional enforcement into more of a political than a judicial process, whilst still retaining a role for the courts to ensure that constitutional values are enforced.<sup>577</sup>

In our constitutional democracy, it is incumbent on policy-makers and implementing agents to consult with poor communities and individuals about the needs to be addressed and the most effective way to address them. This is consistent with constitutional values of accountability, responsiveness and openness, found in section 1 of the Constitution and underpinning our democratic developmental state.<sup>578</sup> There are no doubt numerous examples of where this form of “political engagement” takes place already, but it needs to be strengthened and extended and the Courts can assist in making this happen. The Constitution expressly provides for public access to and participation in legislative

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<sup>575</sup> Ray *Engagement's Possibilities and Limits*.

<sup>576</sup> Ray *Engagement's Possibilities and Limits* 18.

<sup>577</sup> Ray *Engagement's Possibilities and Limits* 23. See also Ray *Engaging with Social Rights*; Sabel & Simon (2003-2004) 117 *Harvard Law Review* 1016, which discusses their analysis of US structural interdicts and institutional governance reforms; Liebenberg *Socio-Economic Rights* 378, 434-438; K G Young “A typology of economic and social rights adjudication: Exploring the catalytic function of judicial review” in *International Journal of Constitutional Law Advance* (2011); A Klein “Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights” 39 *Columbia Human Rights Law Review* 351 (2008).

<sup>578</sup> G Muller “Conceptualising “Meaningful Engagement” as a Deliberative Democratic Partnership” (2011) 22(3) *Stellenbosch Law Review* 742-758.

processes,<sup>579</sup> as well as executive processes by providing that “people’s needs must be responded to, and the public must be encouraged to participate in policy-making”.<sup>580</sup> The Constitutional Court has in several cases underscored the centrality of participatory democracy to the achievement of constitutional goals and values,<sup>581</sup> the necessity of this participation for purposes of informed decision-making<sup>582</sup> and affirmed the duty of the State to take positive measures to ensure that the public has the effective capacity and opportunity to participate in decision-making processes.<sup>583</sup> In particular, it has highlighted the need to listen to the voices of the poor and marginalised in society.<sup>584</sup>

Moreover, the Constitutional Court appears to favour the meaningful engagement approach as one way of accommodating the separation of powers dilemma with which it is constantly confronted. In *Matatiele Municipality and Others v President of the RSA and Others (No 2)*, a case about inadequate public participation in the demarcation of municipal boundaries in Matatiele and Maluti, the court said that the state didn’t have to follow the views of the people in order for the participation to be meaningful, but merely consider them and be open to them.<sup>585</sup> One of the main concerns of the poor residents of Matatiele and Maluti was their access to government services. The form of the participation and “political engagement” is thus of vital importance in order not to get to the point of “litigation engagement”, where parties are then forced by the courts to find an amiable solution and to implement such solution through structural remedies. To truly reach the point of transformative engagement, poor people must be heard and negotiated with in good faith - prior to litigation being on the cards - and only then will

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<sup>579</sup> Sections 57, 59, 70, 72, 74, 116, 118, 160. See chapter two.

<sup>580</sup> Section 195(1)(e). Sections 50 and 51 of the Municipal Systems Act 32 of 2000 affirm the application of the constitutional principles governing public administration to the provision of municipal services.

<sup>581</sup> In *Masetlha v President of the Republic of South Africa and Another* 2008 (1) BCLR 1, para 181, the Constitutional Court elaborated upon the goals and values of the Constitution in relation to democracy and participation: “[I]t is apparent from the Constitution that the democratic government that is contemplated is a participatory democracy which is accountable, transparent and requires participation in decision-making.”

<sup>582</sup> *Poverty Alleviation Network v President of the Republic of South Africa* 2010 (6) BCLR 520 (CC) para 33.

<sup>583</sup> See *Doctors for Life International v The Speaker of the National Assembly* 2006 (12) BCLR 1399 (CC) paras 108, 112–117.

<sup>584</sup> Para 115, where the Constitutional Court highlighted the importance and value of participation by marginalised groups in legislative processes in giving legitimacy to legislation and dignity to those who participate. See further the discussion in chapters five and six.

<sup>585</sup> 2007 (1) BCLR 47 (CC).

empowerment and upliftment of the poor be truly possible in a democratic developmental state.

#### 4 6 6 Enforcement of court orders through structural remedies

Despite the successful litigation of socio-economic rights cases for the benefit of the poor, all levels of government have been criticised for partially or completely ignoring their court-ordered obligations.<sup>586</sup> This refers to all forms of remedies including declaratory orders, interdicts against state action, orders for compensation or mandatory orders to revert to a “status quo”. Jonathan Berger argues that this is the case irrespective of the strength of the order and that follow-up litigation is a regular feature of almost all socio-economic rights cases.<sup>587</sup> In attempting to explain these unsatisfactory results, Langford and Kahanovitz argue that “supply-side factors such as the level of support within the bureaucracy and government for the judgment, the complexity and cost of the orders, the extent of soft and hard judicial power and the power of relevant non-state actors” are all significant.<sup>588</sup>

It is often contended that a key factor appears to be the degree of pressure and level of organisation of the applicants or civil society. In assessing the impact and enforcement of socio-economic rights litigation in South Africa, the presence of a strong social movement, NGO, campaign or organised community in support of the applicant, is seen as a decisive variable.<sup>589</sup> The limited and distant outcomes for the poor litigants in

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<sup>586</sup> See the SASSA social grants cases as a glaring example: *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) BCLR 1 (CC); *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 (6) BCLR 641 (CC); *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2015 (6) BCLR 653 (CC); *Black Sash Trust v Minister of Social Development* [2017] ZACC 8; 2017 (5) BCLR 543 (CC) and ZACC 20; 2017 (9) BCLR 1089 (CC). See also *Section 27 v Minister of Education* 2013 (2) BCLR 237 (GNP).

<sup>587</sup> J Berger “Litigating for Social Justice in Post-Apartheid South Africa: A Focus on Health and Education” in V Gauri & D Brinks (eds) *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (2008).

<sup>588</sup> M Langford & S Kahanovitz *Just Tick The Boxes? Judicial Enforcement In South Africa* May 2010 unpublished paper (copy on file with author) [https://www.escr-net.org/sites/default/files/Langford\\_and\\_Kahanovitz\\_-\\_South\\_Africa\\_0.pdf](https://www.escr-net.org/sites/default/files/Langford_and_Kahanovitz_-_South_Africa_0.pdf) (accessed 7-11-2016).

<sup>589</sup> See for example *Minister of Health v Treatment Action Campaign (No 2)* 2002 (10) BCLR 1033 (CC); *Abahlali Basemjondolo Movement SA v Premier of the Province of Kwazulu-Natal* 2010 (2) BCLR 99 (CC) and *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 (9) BCLR 847 (CC); *Black Sash*

*Grootboom* versus *TAC* and *Abahlali* is often cited in support of this view.<sup>590</sup> The emphasis on the civil support structure also accords with international research, although it does not necessarily accord with all comparative experience.<sup>591</sup> Nevertheless, a strong, coordinated voice advocating for the rights of poor and dispossessed people is an important accountability mechanism for the executive, the legislature and the courts, in a democratic developmental state. In the recent judgement of the *Land Access Movement of South Africa v Chairperson of the National Council of Provinces*<sup>592</sup> (“*Land Access Movement*”), the Constitutional Court declared that Parliament had failed to satisfy its obligation to facilitate public involvement on the Restitution of Land Rights Amendment Act 15 of 2014, in accordance with section 72(1)(a) of the Constitution and thus declared the Act invalid.<sup>593</sup>

Arguments for supervisory jurisdiction by the court might be stronger in cases without strong social movement backing. Cases like *Hoërskool Ermelo* and *Juma Musjid* where the court required both the SGB and the HOD to report back to it once the policies had been reviewed, may produce better outcomes. In the High Court judgment of *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Others*<sup>594</sup> Cleaver J granted a structural interdict in terms of which the respondents were ordered to submit a program to the court as to how they intended to remedy the breach of the rights of the affected children and to report on a periodic basis as to the progress

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*Trust v Minister of Social Development* [2017] ZACC 8; 2017 (5) BCLR 543 (CC) and ZACC 20; 2017 (9) BCLR 1089 (CC). See also F Veriava *The Limpopo Textbook Crisis 2012* <<http://www.section27.org.za/wp-content/uploads/2013/10/The-2012-Limpopo-Textbook-Crisis1.pdf>> (accessed 30-09-2016). See also generally M Langford et al (eds) *Symbols or Substance* (2013); and specifically B Goldblatt & S Rosa “Social Security Rights” in M Langford et al (eds) *Symbols or Substance* (2013) on the role of the Alliance for Children’s Entitlement to Social Security as an organising campaign for the extension of the Child Support Grant to all poor children under the age of 18 and the threat of potential litigation in the ultimate success of the campaign.

<sup>590</sup> See Berger “Litigating for Social Justice” in *Courting Social Justice*, for his wider review of cases generally supporting the importance of civil society pressure. The Treatment Action Campaign attributes its temporary failure to enforce the Nevirapine order due to its attention being diverted by other issues. In addition, applicant communities often experience different levels of organisation and unanimity.

<sup>591</sup> See for example Langford & Kahanovitz *Judicial Enforcement In South Africa* 3-4.

<sup>592</sup> 2016 (10) BCLR 1277 (CC).

<sup>593</sup> Para 93.

<sup>594</sup> 2011 (5) SA 87 (WCC). See also C Ngweni and L Pretorius “Substantive equality for disabled learners in state provision of basic education: a commentary on *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*” (2012) 28(1) SAJHR 81-115.

made and what further progress was intended. As to the basis for granting such an interdict, reference was made to the judgment in *City of Cape Town v Rudolph* in which Selikowitz J held that “[a]ppropriate or just and equitable relief, is relief which is *effective*.”<sup>595</sup> He stated that the relief must be selected in terms of its ability to protect the constitutional right that has been infringed and its effectiveness will depend on the factual context of the case.

In *Fose v Minister of Safety and Security*<sup>596</sup> (“*Fose*”) Ackermann J stated that appropriate relief is required to “protect and enforce the Constitution” and for this purpose could take the form of “a declaration of rights, an interdict, a mandamus or some other relief as is necessary under the circumstances”.<sup>597</sup> He held that the circumstances of the case, such as the attitude of the applicant in relation to the situation of the respondents, would make a structural interdict an appropriate order. He also stressed the importance of the effectiveness of the remedy, in the context of an infringement of an entrenched constitutional right.<sup>598</sup>

Such relief has been granted on numerous occasions and is appropriate when the court does not wish to prescribe to the respondent in detail what steps must be taken. Relief of this nature was also granted in *Rail Commuters Action Group v Transnet Limited t/a Metro Rail*<sup>599</sup> (“*Rail Commuters*”). In *N v Government of Republic of South Africa (No 1)*,<sup>600</sup> while recognising that the grant of a structural interdict might amount to interference with the authority and discretion of the executive arm of the government, the court held structural relief was justified on the basis of the circumstances in the case. The Court found there was nothing “rational” or “workable” coming from the respondents and there

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<sup>595</sup> 2004 (5) SA 39 (C) 74.

<sup>596</sup> 1997 (3) SA 786 (CC).

<sup>597</sup> Para 19.

<sup>598</sup> *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) paras 19, 69.

<sup>599</sup> 2003 (5) SA 518 (C). See also *Kiliko and Others v Minister of Home Affairs and Others* 2006 (4) SA 114 (C) para 32.

<sup>600</sup> 2006 (6) SA 543 (D) para 32.

were many “delays, obstacles and restrictions”, in violation of the applicants’ constitutional rights.<sup>601</sup>

In the various *Pheko* judgments No 1, 2 and 3,<sup>602</sup> the court granted a structural remedy that required regular reporting back to the Court. The judge in *Pheko (No 3)*<sup>603</sup> gave an order whereby the High Court must deal with the disputed facts related to the identification of suitable alternative land for the Bapsfontein community. In *Pheko (No 3)* the judge stated: “supervisory orders arising from structural interdicts ensure that courts play an active monitoring role in the enforcement of orders”.<sup>604</sup> The court held that this was an appropriate case for supervisory relief, in order to guarantee a commitment to the constitutional values of accountability, responsiveness and openness by all concerned, in a system of democratic governance. The granting of a structural interdict is intended to secure a response in the form of reports in order to ensure compliance with the positive obligations imposed by its order. The court’s role is thus to continue to monitor the implementation of the remedy it has ordered until it has been fulfilled.

The design of court orders can also be more influential and provide direct or supervisory access to the lower courts.<sup>605</sup> These are designed in such a way that allows parties easy access to lower courts where their constitutional rights have allegedly been infringed upon and judges are required to resolve the matter within a certain time period. Judges may make any order they deem appropriate and the decision must be carried out

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<sup>601</sup> Para 32.

<sup>602</sup> *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 (4) BCLR 388 (CC); *Pheko v Ekurhuleni Metropolitan Municipality* 2015 (6) BCLR 711 (CC) (*‘Pheko No 2’*); *Pheko v Ekurhuleni Metropolitan Municipality (No 3)* 2016 (10) BCLR 1308 (CC) (*‘Pheko No 3’*).

<sup>603</sup> *Pheko v Ekurhuleni Metropolitan Municipality (No 3)* 2016 (10) BCLR 1308 (CC).

<sup>604</sup> Para 1.

<sup>605</sup> For example the immediate, individualised and minimum *tutela* orders in jurisdictions like Costa Rica and Colombia seem to produce relatively high levels of compliance. See Langford *Social Rights Jurisprudence* 146. This writ of protection may be filed by any person whose constitutional rights have been violated or threatened and will receive protection. The trial judge has a period of ten days between the filing of the writ and the resolution. The *tutela* decisions have no specific remedy. The protection consists of an order made by the judge for parties to act or refrain from acting. The judges may choose the measures they see fit in the circumstances of the case to protect constitutional rights and the decision must be complied with immediately. It may be challenged before a superior court.



immediately. In the case of *Pheko (No 3)*, the court gave the High Court jurisdiction over the reporting and monitoring of the case.<sup>606</sup>

In the most startlingly ineffective example of the application of structural remedies, the *AllPay* judgments, the court put in place supervisory orders to ensure that the social grants system would not be jeopardised by the declaration of invalidity of the social grants payment contract.<sup>607</sup> The court intended to supervise the process by which the Department of Social Development ('DSD') and the South African Social Security Agency ('SASSA') would engage in a new tender process for the proper administration of 17 million social grants. The Department and SASSA were required to report to the Court on progress with the tender award process. When the Court was satisfied that proper procedures were in place and underway, it withdrew its supervisory order, only to be drawn back into a crisis situation in March 2017 after the tender was not awarded and the DSD could not meet its deadline to have a new contract in place by end March 2017.

The non-governmental organisation, Black Sash, concerned that social grants would not be paid to 17 million beneficiaries in need in April 2017, took the Minister and the DSD to the Constitutional Court to compel an urgent solution to the grants crisis.<sup>608</sup> The court ordered an extension of the invalid contract for a further year in order to avert the collapse of the social grants payment system. It was harsh in its critique of the Minister and Department's lack of progress and any apparent urgency on the matter over the two years since the *AllPay* judgement. Without the intervention of the Black Sash, the court and the issuing of yet another ongoing supervisory order, millions of people and their families, who are also dependent on their social grants, would have been left destitute.

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<sup>606</sup> *Pheko v Ekurhuleni Metropolitan Municipality (No 3)* 2016 (10) BCLR 1308 (CC) ('*Pheko No 3*') para 46. See also *Occupiers of Erven 87 and 88 Berea v De Wet* (CCT108/16) [2017] ZACC 18 (8 June 2017).

<sup>607</sup> *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) BCLR 1 (CC); *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 (6) BCLR 641 (CC); *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2015 (6) BCLR 653 (CC).

<sup>608</sup> *Black Sash Trust v Minister of Social Development* [2017] ZACC 8; 2017 (5) BCLR 543 (CC) and ZACC 20; 2017 (9) BCLR 1089 (CC).



There is vast potential for structural interdict remedies to promote both far-reaching institutional reforms and participatory democracy. In a democratic developmental state, it is crucial that the administration, the executive or the legislature is effective in its capacity to deliver on the outcomes of litigation and that these institutions are held accountable and demonstrate respect for the legitimate role of the courts under a constitutional democracy. Structural remedies allow the courts to play a monitoring role over the obligations of the other spheres and organs of the state, and ensure accountability and responsiveness in a democratic developmental state.

## 4.7 Conclusion

Justiciable socio-economic rights in a transformative Constitution, assist in monitoring the State's progressive realisation of its constitutional obligations to the poor and ultimately holding the State accountable for these obligations. However there are limits to the extent to which these rights have been able to support wide-scale socio-economic transformation in South Africa over the past 21 years, since the enactment of the Final Constitution. This is due, in particular, to the reluctance of the courts to engage with the substance of the rights, the deference the courts have shown to the mandates of the other arms of government and the difficulties experienced with the enforcement of remedies.

I have argued that the Constitutional Court's socio-economic rights jurisprudence can significantly contribute to this long-term developmental enterprise. The courts need to engage with the substance of rights, in a collaborative way that not only solves the immediate problems faced by litigants in the cases before them, but that also creates certainty via systemic solutions to poor people in similar circumstances. The South African Constitutional Court ruled in *Grootboom* and in subsequent cases discussed above, that reasonableness is the benchmark set for government action and inaction in the context of socio-economic rights for people living in poverty. This situation has led many to view the socio-economic rights jurisprudence through a procedural lens and to characterise the Court's approach as deferential. Young's typology of the Court's review provides a more nuanced understanding of the court's approach over the past two

decades of the socio-economic rights jurisprudence. I argue similarly that by playing a proactive role, via managerial and experimentalist review methods, the Court can delve deeper into the substantive interpretation of rights, including their intent, their contours and their potential policy implications, without assuming a supremacist position.

In a democratic developmental state, the courts as an institution can also be “democratised” by holding the state accountable and facilitating the meaningful participation of poor people and other critical role-players in the realisation of socio-economic rights. The courts have the power to bring the various parties together to solve socio-economic issues, including affected communities, experts and state officials. The jurisprudence of the Constitutional Court in relation to “meaningful engagement” in particular, has provided fertile ground in eviction and education rights cases for participatory democracy to flourish. The integrated, multi-dimensional human rights approach and the capabilities approach to poverty alleviation acknowledges the critical, transformational importance of participatory rights for poor people. The democratic developmental state espouses participation as foundational to bringing about deep and sustained socio-economic transformation, as the main aim of a democratic developmental state. The next chapter will look at how administrative justice, as a participatory right, can further contribute to the redress of poverty in a democratic developmental South African state.

## CHAPTER 5: Administrative Justice to Address Poverty

### 5.1 Introduction

This chapter will discuss the realm of administrative law and delve into the role that administrative justice can play to advance socio-economic transformation in a South African democratic developmental state. South African administrative law has advanced significantly from a procedurally focused area of law, since the advent of democracy. The inclusion of “justifiability” in section 24(d) of the 1993 Constitution and thereafter “reasonableness” in section 33(1) of the Final Constitution as a ground for review of “administrative action” is one demonstrable way in which South African administrative law has shifted towards a more substantive conception of review. I will consider the scope and the substantive content of the requirements under the right to “just administrative action” in section 33(1), in particular the elements of “lawfulness”, “reasonableness” and “procedural fairness”, in furthering the aims of transformative constitutionalism in a South African democratic developmental state.

The purpose of this analysis is to explore the role and substantive content of administrative justice in advancing good governance and addressing poverty, alongside socio-economic rights provisions, in the context of a democratic developmental state. Following on from the discussion in chapter four above, I examine the promise of a substantive right to just administrative action to be a platform for the voices of poor and vulnerable people in South Africa, in relation to the provision of public goods. Giving people a say in decision-making where administrative action is concerned, can shape a sense of empowerment and agency as a necessary dimension of poverty alleviation, discussed in chapters two and three. Participation of the poor in the determination and provision of public goods, furthers participatory democracy, and enhances accountability and good governance in a democratic developmental state. It is also a critical aspect of the multi-dimensional human rights approach to poverty, described in chapter three.

I begin with a contextual overview of the evolution of administrative law globally. The changing situation of global governance and the global economy has resulted in administrative law assuming a more prominent role. I discuss the growing body of international law and jurisprudence in the area of administrative law with a view to locating its modern purpose and, in particular, the pivotal role of administrative justice in fostering socio-economic transformation within a democratic developmental state.

I then briefly outline the history of South African administrative law, up to the present day. Thereafter, I explain the current interaction between section 33 of the Constitution, the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') (meant to give effect to the Constitution) and the common law, in the context of a transformative constitution. I focus my discussion in relation to the requirements under section 33(1), of "lawfulness", "reasonableness" and "procedural fairness", on the conceptions of these elements that are significant in cases relating to the adjudication of socio-economic rights. In the first instance, the aim is to highlight the extent to which substantive considerations can enter the essential elements of section 33 in order for administrative law to be capable of bringing about "justice" not purely in a procedural or "means" sense, but also in an "ends" sense. As Quinot and Liebenberg explain, administrative law review since the advent of the Constitution must now be understood "as part of administrative justice within a justiciable bill of rights."<sup>609</sup> In the second instance, the aim is to support my argument that true socio-economic transformation can only take place in a democratic developmental state, where participatory democracy and accountability thrive. The safeguards of administrative justice, I argue, are essential elements of this project and "ends" in themselves, in an integrated view of a human rights approach to poverty.

The courts post democracy in South Africa, have interpreted and expanded the notions of lawfulness and legality in interesting and innovative ways. These could be employed to further socio-economic transformation under a constitutional dispensation in a democratic developmental state. Legality is now much closer to the notion of

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<sup>609</sup> G Quinot & S Liebenberg "Narrowing the band: Reasonableness review in administrative justice and socio-economic rights jurisprudence in South Africa" (2011) 22 (3) *Stellenbosch Law Review* 639-663, 641.

administrative justice as it includes both rationality and procedure.<sup>610</sup> I then examine the evolution of “reasonableness” as a standard of review in administrative law and the shift towards a more substantive conception of review. I examine the implications of that change in cases involving review of administrative action where socio-economic rights are impacted. Quinot and Liebenberg refer to these as “overlap cases”.<sup>611</sup> These cases demonstrate overlapping, and potentially complementary standards, of reasonableness review under the different constitutional provisions. The reasonableness standard of review under administrative justice includes a procedural as well as a substantive element. Both are necessary to fulfil the ideals of our transformative constitution in a democratic developmental state, from the perspective of a multi-dimensional approach to poverty. Finally, I discuss the requirement of procedural fairness in the “overlap” cases, as a participatory element of administrative justice that is complementary to socio-economic rights and critical to participatory democracy.

It is within this context that this chapter investigates the role of administrative law in the socio-economic transformation of South Africa, as a democratic developmental state. Administrative law has a vital role to play in maintaining transparency and accountability of public institutions as well as institutions performing public roles, promoting participatory and deliberative democracy and ensuring good governance. This is critical to addressing multi-dimensional poverty and inequality in the long-term, in a democratic developmental state.

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<sup>610</sup> H Corder “The development of administrative law in South Africa” in G Quinot (ed) *Administrative Justice in South Africa* (2015) 2-26; C Hoexter *Administrative Law in South Africa* (2012) 253.

<sup>611</sup> Quinot & Liebenberg (2011) *Stellenbosch Law Review* 641. These cases are: *Minister of Public Works v Kyalami Ridge Environmental Association (Mukhwevho Intervening)* 2001 (7) BCLR 652 (CC); *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC); *Jaftha v Schoeman*; *Van Rooyen v Stoltz* 2005 (1) BCLR 78 (CC); *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA, Amici Curiae)* 2005 (8) BCLR 786 (CC); *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (5) BCLR 475 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 (9) BCLR 847 (CC); *Mazibuko v City of Johannesburg* 2010 (3) BCLR 239 (CC); *Joseph v City of Johannesburg* 2010 (3) BCLR 212 (CC); *Abahlali Basemjondolo Movement SA v Premier of the Province of KwaZulu-Natal* 2010 (2) BCLR 99 (CC); *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (3) BCLR 177 (CC); *Nokotyana v Ekurhuleni Metropolitan Municipality* 2010 (4) BCLR 312 (CC); *Governing Body of the Juma Musjid Primary School and Another v Ahmed Asruff Essay NO and Others* 2011 (8) BCLR 761 (CC); *South African Informal Traders Forum and Others v City of Johannesburg and Others*; *South African National Traders Retail Association v City of Johannesburg and Others* 2014 (6) BCLR 726 (CC).

## 5.2 The evolution of administrative law in a modern, developing world

The basic format and the principles of administrative law have developed over centuries, but its recognition as a separate branch of law has only transpired over the last century.<sup>612</sup>

The earliest establishment of administrative law as a field of study began in France in the late 19<sup>th</sup> century – inspired by the professionalisation of their public administration, their history of extensive executive powers and the application of the doctrine of separation of powers.<sup>613</sup> Since then it has grown into a vast field.

Administrative law can now be divided into general and particular categories: (a) General administrative law comprises “the general principles of law, which regulate the organisation of administrative institutions and the fairness and efficacy of the administrative process, which govern the validity of and liability for administrative action and inaction, and which govern the administrative and judicial remedies relating to such action or inaction”; and (b) Particular administrative law encompasses the legislation, legal principles and policies developed in relation to specific areas of administration.<sup>614</sup> This dissertation is primarily concerned with general administrative law.<sup>615</sup>

Due to the rapid transformations in the nature and structure of modern society and the rise in prominence of human rights, the realm of administrative law has begun to widen and deepen into socio-economic spheres.<sup>616</sup> Baxter discusses a number of changes that have had a significant impact on the direction of contemporary administrative law.<sup>617</sup> First, and most importantly for purposes of this dissertation, the rise of the welfare state and the developmental state as a result of changing political attitudes, growing poverty and inequality and technological advancement, has elevated administrative law in

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<sup>612</sup> Baxter *Administrative Law* 46-56; C Hoexter *Administrative Law in South Africa* 2 ed (2012).

<sup>613</sup> Baxter *Administrative Law*. See discussion on the separation of powers in chapter four.

<sup>614</sup> Baxter *Administrative Law* 54-55.

<sup>615</sup> Certain areas of particular administrative law such as social security law or education law may also have significant implications for the realisation of socio-economic rights, but a consideration of those particular areas fall beyond the scope of this study.

<sup>616</sup> Baxter *Administrative Law* 35, 63. See also Corder “The development of administrative law in SA” in *Administrative Justice in SA* 2-26, 24.

<sup>617</sup> Baxter *Administrative Law* 64-70.

relation to the delivery of social services to people and to their participatory rights.<sup>618</sup> Second, in the field of national or state security, there has been a heightened preoccupation with terrorism and consequently far-reaching powers of administrative agencies are also having an immense impact on individual liberties.<sup>619</sup> Third, there has been a rapid expansion of the contracting power of public authorities as a method of policy implementation.<sup>620</sup> Baxter refers to this as part of the emergence of “administrative corporatism”, which blurs the public-private divide in delivering public functions. He describes this trend as manifesting in three ways: in the “increased collaboration between government and private organisations for the purpose of conducting public ventures, such as economic development”; in the “publication of trades and professions”; and in the creation of copious policy councils and advisory committees in Parliament “covering almost every facet of public administration”.<sup>621</sup> Fourth, there is a growing need for regulation of inter-governmental relations, in particular central/local government relations. Finally, there is the role of administrative law in economic regulation.

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<sup>618</sup> Only in rare cases do entitlements to natural justice and judicial review hold the status of human rights, such as in the South African Bill of Rights, the Constitutions of Namibia Article 18 <http://www.orusovo.com/namcon/> (accessed 18-09-2016); Ghana Article 2 [http://www.judicial.gov.gh/constitution/chapter/chap\\_1.htm](http://www.judicial.gov.gh/constitution/chapter/chap_1.htm) (accessed 18-09-2016); and the New Zealand Bill of Rights Act No 109 1990, Article 27, Right to justice.

<sup>619</sup> In the Australian context, for example, in the absence of a Bill of Rights, administrative law has become a highly advanced tool for the protection and promotion of human rights, and as a constraint on public power. Australia has no statutory or constitutional Bill of Rights. Human rights claims have thus permeated administrative law because, like human rights law, it primarily constrains the exercise of public power, often in critical areas of public policy. As a consequence, Australian administrative law is more advanced than most jurisdictions and certainly more than international human rights law, since it provides both merits review and essential judicial guarantees of procedural fairness in administrative decision-making. In particular, administrative law has been used to challenge decisions about refugee status, where aggrieved applicants have sought judicial review regarding what are essentially human rights claims. These migration cases have seen the expansion of the scope of natural justice and other grounds of review, as well as a blurring of the legality/merits distinction. At the same time, without a bill of rights to bring human rights and administrative law together, Groves and Lee argue that Australian administrative law grounds for review have remained immune from consideration of human rights in administrative decision-making. McMillan and Williams argue that Australian law does secure a right to administrative justice, which is expressed as a right of individuals to seek judicial review of government decisions adversely affecting them; a right of appeal on the merits to a tribunal or a court (which may incorporate a human rights perspective in substituting the “correct or preferable decision”); and a right of judicial review on the law and merits on matters of special importance. See generally M Groves & H Lee (eds) *Australian Administrative Law: Fundamentals, Principles and Doctrines* (2007); J McMillan “Judicial Restraint and Activism in Administrative Law” (2002) 30 *Federal Law Review* 335 at 336; C Beaton-Wells “Australian Administrative Law: The Asylum Seeker Legacy” (2005) *Public Law* 267; N McMillan and N Williams “Administrative Law and Human Rights” in D Kinley (ed) *Human Rights in Australian Law* (1998) 63 at 82.

<sup>620</sup> See generally G Quinot *State Commercial Activity: A Legal Framework* (2009).

<sup>621</sup> Baxter *Administrative Law* 15.



These global trends, transpiring equally in the South African context, have all led to a growing debate about the relationship between the judiciary, the executive and the legislature and the degree to which administrative disputes are justiciable in the courts.<sup>622</sup> As such, there is an emergence of new attempts to analyse administrative law and apply new theories to it, at an international, regional and national level. These efforts highlight the substantial socio-economic challenges the world faces, the endeavours to regulate the global economic order and together address the challenges of widespread poverty and the ongoing infringement of human rights, by the public and private spheres. Such patterns are also clearly discernible in the present South African political, economic and legal dispensation, especially vivid in the mounting corruption of the state and its capture by private interests.<sup>623</sup> They have direct and indirect impact on the role of administrative justice to address the ongoing situation of poverty and inequality and enhance transparency, accountability and participatory democracy in a democratic developmental state.

The next section looks at the current status and rising importance of administrative justice in international human rights law, in response to the trends featured in this section. Although South African administrative law is arguably substantially ahead of the international trends, a discussion of the international law context provides a legal-political framework for understanding the role of administrative justice and the intersection with socio-economic rights, in a democratic developmental state.

### **5.3 Administrative justice in international law**

Administrative justice under international law is sorely underdeveloped. The right to administrative justice is not explicitly recognised in any of the international human rights covenants or regional conventions. The right has only been inferred from the European human rights jurisprudence, namely from the fair hearing provision article 6(1) in the

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<sup>622</sup> See discussion of separation of powers in chapter four. See also the latest case of *Electronic Media Network Limited v e.tv (Pty) Limited* 2017 (9) BCLR 1108 (CC).

<sup>623</sup> See Public Protector “State of Capture Report No.2 of 2016/17” (14-10-2016) *Public Protector South Africa* <[http://www.pprotect.org/library/investigation\\_report/2016-17/State\\_Capture\\_14October2016.pdf](http://www.pprotect.org/library/investigation_report/2016-17/State_Capture_14October2016.pdf)> (accessed 29-05-2017).

European Convention and the “right to good administration” in the Charter of Fundamental Rights of the European Union 2000 (“CFREU”). Few of the older international human rights instruments treat access to a court to challenge detrimental administrative decisions as a human right. Article 14 of the International Covenant on Civil and Political Rights (“ICCPR”), and Articles 6 and 13 of the European Convention on Human Rights (“ECHR”) are the rare examples, although heavily circumscribed in their application.<sup>624</sup> These international treaties arose in a post-war period and have since been interpreted in accordance with more modern notions in recent times. Contemporary charters, like the CFREU, reflect an evolution of administrative law that recognises the increasing power of administrative decision-making over people’s lives and the need to protect individual social and economic interests from both public and private power.<sup>625</sup> The potential therefore exists to extend the realm of international administrative justice rights in the context of the realisation of socio-economic rights, in the manner of an integrated human rights approach to poverty discussed in chapter three.

### 5.3.1 International human rights law

There is no explicit right to administrative justice in international human rights law. Article 14(1) of the ICCPR establishes only that in the determination of a “criminal charge” or “rights and obligations in a suit at law”, a person is “entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”.<sup>626</sup> A “suit at law”

<sup>624</sup> International Convention on Civil and Political Rights, Art 14, 999 U.N.T.S. 171 (1966); European Convention on Human Rights, Arts 6, 13, opened for signature 4 Nov. 1950, 213 U.N.T.S. 221 (1955). See further discussion below. In several cases, the European human rights bodies have confirmed the importance of this right in relation to administrative decisions by intergovernmental bodies.

<sup>625</sup> Charter of Fundamental Rights of the European Union of 2000 (2000/C 364/01). The Charter of Fundamental Rights of the European Union of 2000 contains Article 41 “Right to good administration”, which protects the right of every person: “to have his or her affairs handled *impartially, fairly and within a reasonable time* by the institutions and bodies of the Union”; “*to be heard*, before any individual measure which would affect him or her adversely is taken”; and “the obligation of the administration *to give reasons* for its decisions” [emphasis added].

<sup>626</sup> ICCPR, Article 14 states:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special

was historically understood as meaning a civil action in court, and did not extend to encompass administrative decisions or actions. This limitation reflects the historical circumstances during the period 1945-1966, in which the human rights treaties were drafted, when the full effects on individuals of the explosive growth of the modern regulatory state were not yet felt. Civil or criminal proceedings were still considered the primary means by which legal rights and interests were affected, and the importance of safeguarding the individual from bureaucratic oppression and maladministration was not fully recognised.

However, more recently, the Human Rights Committee, in General Comment 32, “Article 14: Right to equality before courts and tribunals and to a fair trial”,<sup>627</sup> has extended its application and declared that:

“The concept of determination of rights and obligations ‘in a suit at law’ ... encompasses (a) judicial procedures aimed at determining rights and obligations pertaining to the areas of contract, property and torts in the area of private law, as well as (b) equivalent notions in the area of administrative law such as the termination of employment of civil servants for other than disciplinary reasons, *the determination of social security benefits or the pension rights of soldiers, or procedures regarding the use of public land or the taking of private property*. In addition, it may (c) cover *other procedures* which, however, *must be assessed on a case by case basis in the light of the nature of the right in question*.”<sup>628</sup>

This provides an opening up of international “administrative justice” rights to socio-economic areas such as social security and property and acknowledges the important role it can play in determining rights and obligations under international human rights law. This is potentially useful jurisprudence for the South African courts when determining cases where administrative justice rights affect socio-economic rights.

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circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

<sup>627</sup> Human Rights Committee, General Comment No 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007).

<sup>628</sup> Human Rights Committee, General Comment No 32, para 16 [emphasis added].

Article 14 is said to be limited though, in that it guarantees procedural equality and fairness only and cannot be interpreted as ensuring the absence of error on the part of the competent tribunal. It is generally for the courts of States parties to the Covenant to review facts and evidence, or the application of domestic legislation, in a particular case, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice, or that the court otherwise violated its obligation of independence and impartiality. The same standard applies to specific instructions to the jury by the judge in a trial by jury.

### 5.3.2 European Convention on Human Rights

The ECHR does not make explicit mention of any right to administrative justice in the making of decisions, however protection for such rights, have been derived from Article 6(1) through interpretation. Article 6(1) provides that in the determination of their “civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. Under Article 6 of the ECHR, state parties must ensure that the procedural standards of the international organisations of which they are members are equivalent to their domestic standards.

Christopher Forsyth explains that article 6(1) was originally intended to apply to the determination of private law rights only and not to public law matters, and to judicial proceedings rather than administrative proceedings.<sup>629</sup> However, given the modern far-reaching duty of procedural fairness applicable to administrative decision-makers, the European jurisprudence has accepted that Article 6(1) applies in administrative matters.<sup>630</sup> The jurisprudence of the European Court of Human Rights (“European Court”) has also accepted that the failure of an initial decision to comply with Article 6(1) may be

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<sup>629</sup> C Forsyth “Article 6(1) of the European Convention and the curative powers of judicial review” *The Cambridge Law Journal* Vol 60(3) (2001) 449-452, 449.

<sup>630</sup> See *Ringeisen v Austria* (No 1) (1971) 1 EHRR 455; and *Fredin v Sweden* (1991) 13 EHRR 784.

cured if the person aggrieved can bring the case on review before an independent and impartial tribunal of “full jurisdiction”.<sup>631</sup>

Applying the jurisprudence under Article 6(1) of the European Convention in *R. (Alconbury Developments Ltd.) v Secretary of State for the Environment, Transport and the Regions* (*‘Alconbury’*),<sup>632</sup> the House of Lords held that the decision of the Secretary of State in a planning matter could be questioned before the High Court by a special form of judicial review – an application under section 288 of the Town and Country Planning Act 1990. However the merits of the decision could not be questioned in such proceedings and was unnecessary to cure the lack of impartiality and independence of the Secretary of State in the case in question. Forsyth critiques the decision in *Alconbury* for being “incoherent” because “the supposed flaw in the Secretary of State’s decision was his reliance upon his own policy and understanding of the public interest”. That “flaw” cannot be cured by judicial review proceedings that do not reconsider his reliance upon that policy, and therefore that do not touch the merits.<sup>633</sup> However, extension of the grounds of judicial review to ensure that the jurisdiction of the reviewing court is sufficiently full were laid in *Alconbury*, where Lord Slynn remarked further that “the court has jurisdiction to quash for a misunderstanding or ignorance of an established and relevant fact”,<sup>634</sup> thus forming the foundation for the judicial review for error of fact in the English system.

Forsyth identifies two particular instances in which the applicability of Article 6(1) to administrative decision-making is “somewhat vexed”.<sup>635</sup> First, it is often unclear when an administrative decision determines “civil rights”. Second, whilst non-compliance with Article 6(1) may be “cured” where the person aggrieved has access to a court of “full

<sup>631</sup> *Bryan v United Kingdom* (1995) 21 EHRR 116.

<sup>632</sup> [2001] 2 WLR 1389.

<sup>633</sup> Forsyth (2001) *Cambridge Law Journal* 451.

<sup>634</sup> [2001] 2 WLR 1389, 1407.

<sup>635</sup> C Forsyth “Procedural justice in administrative proceedings and Article 6(1) of the European Convention of Human Rights and Fundamental Freedoms” *The Cambridge Law Journal* Vol 26(2) (2003) 244-247.

jurisdiction”, it is unclear what “full jurisdiction” is in the circumstances.<sup>636</sup> Forsyth discusses the case of *Runa Begum v Tower Hamlets London Borough Council* (“*Runa Begum*”)<sup>637</sup> where the issue of provision of accommodation by a local council to a homeless person arose. The decision taken by the council’s rehousing manager in this case, was held not to have been taken by an “independent and impartial tribunal”. In relation to the merits of the decision and in reliance upon *Alconbury*, the court held that access to a court of “full jurisdiction” meant “full jurisdiction to deal with the case as the nature of the decision requires”.<sup>638</sup> The facts of the case were at issue and so the Court hearing a section 204 appeal under the Housing Act 1996, had the power to quash findings of fact that were perverse or irrational or when there was no evidence to support them, but the court could not substitute its own findings of fact for those of the final instance decision-maker.<sup>639</sup>

Finally, in determining what is meant by “civil rights”, the European Court of Human Rights has held that social security benefits engage Article 6(1).<sup>640</sup> In these cases, the right in question was an individual, economic right that flowed from specific statutory rules. In *Runa Begum*, the issue of “civil rights” engagement did not need to be determined, however Lord Hoffman discussed the issue at length and concluded that the right to accommodation was “akin to a claim for social security benefits”.<sup>641</sup> As Lord Hoffman said:

“An English lawyer can view with equanimity the extension of the scope of article 6 because the English conception of the rule of law requires the legality of virtually all government decisions affecting the individual to be subject to the scrutiny of the ordinary courts .... [T]his breadth of scope is accompanied by an approach to the ground of review

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<sup>636</sup> Forsyth (2003) *Cambridge Law Journal* 244. See also R Wade & C Forsyth *Administrative Law* 11 Ed (2014).

<sup>637</sup> [2003] UKHL 5, [2003] 2 WLR 388 (HL).

<sup>638</sup> Para 5, 85.

<sup>639</sup> Para 99.

<sup>640</sup> *Feldbrugge v Netherlands* (1986) 8 EHRR 425 (contributory sickness benefit claim); *Salesi v Italy* (1993) 26 EHRR 187 (state-funded non-contributory disability pension); *Mennitto v Italy* (2000) 34 EHRR 1122.

<sup>641</sup> [2003] UKHL 5, [2003] 2 WLR 388 (HL) para 55.

which requires that regard be had to democratic accountability, efficient administration and the sovereignty of Parliament.”<sup>642</sup>

This quote highlights the purpose of administrative justice and justifies its widened scope. The right to administrative justice is a critical tool, in a democratic developmental South African state requiring greater democratic accountability and administrative efficiency, particularly in cases where social benefits are determined. The evolving international law and jurisprudence related to global administrative law indicates growing support for a broadened scope and role for administrative justice, in the pursuit of democratic accountability and administrative efficiency in a modern state.

#### 5.4 Global administrative law

The concept of “global administrative law” is still nascent but is taking shape through a growing body of research and practice.<sup>643</sup> It is relevant to briefly mention this concept for the purposes of this dissertation, due to the expanding significance of accountability and participatory approaches in tackling poverty and development challenges. The main writers in this area have identified certain emerging characteristics of global administrative law that elucidate the broader purpose and substantive content of administrative law in a complex, contemporary world and in a democratic, developmental state. Kingsbury explains the basis of global administrative law as being the increased

<sup>642</sup> [2003] UKHL 5, [2003] 2 WLR 388 (HL) para 35.

<sup>643</sup> See for example B Kingsbury, N Krisch & R B Stewart *The Emergence of Global Administrative Law* (2005) New York University Public Law and Legal Theory Working Papers, Paper 17 New York University School of Law <[http://lsr.nellco.org/nyu\\_plltwp/17](http://lsr.nellco.org/nyu_plltwp/17)> (accessed 30-09-2016); C Harlow “Global Administrative Law: The Quest for Principles and Value” (2006) 17 *European Journal of International Law* 197; N Krisch “The Pluralism of Global Administrative Law” (2006) 17 *European Journal of International Law* 247; N Krisch and B Kingsbury “Global Governance and Global Administrative Law in the International Legal Order” (2006) 17 *European Journal of International Law* 1; M Barr & G Miller “Global Administrative Law: The View from Basel” (2006) 17 *Journal of International Law* 15; B Morgan, “Turning Off the Tap: Urban Water Service Delivery and the Social Construction of Global Administrative Law” *European Journal of International Law* (2006) 17(1) 215–46; Quinot *Administrative Justice in South Africa*, chap 4; S Chesterman *Global Administrative Law* (2009) New York University Public Law and Legal Theory Working Papers, Paper 17 New York University School of Law <[http://lsr.nellco.org/nyu\\_plltwp/152](http://lsr.nellco.org/nyu_plltwp/152)> (accessed 30-09-2016); B Kingsbury “The concept of ‘law’ in global administrative law” *The European Journal of International Law* (2009) 20(1) 23-57; and H Corder *Global Administrative Law: Innovation and Development* (2009).



application of trans-governmental regulation and administration in many areas including security, development finance, environmental protection, banking, law enforcement, telecommunications, international trade, intellectual property, and cross-border movements of populations, including refugees. As a result of global interdependence, various transnational regulatory systems have been established through international treaties and cooperation in order to deal with regulatory decisions at a global level.<sup>644</sup>

Kingsbury posits that this global shift “has created an accountability deficit in the growing exercise of transnational regulatory power”.<sup>645</sup> The response to this has been an attempt to extend domestic administrative law to intergovernmental regulatory decisions that affect a nation, as well as the development of new global administrative law mechanisms to address decisions made within the intergovernmental systems.<sup>646</sup>

The focus of the field of global administrative law is on the operation of principles, procedural rules, review mechanisms and other mechanisms to ensure transparency, participation, reasoned decision-making and legality in global governance.<sup>647</sup> The scope reaches even further to propose the inclusion of “substantive law that defines the powers and limits of regulators under human rights treaties and case law defining the conditions under which state organs can interfere with individual liberties”.<sup>648</sup> The normative bases of global administrative law resonate with evolving South African administrative law under a transformative constitution in a democratic developmental state. Kingsbury describes these normative conceptions as follows:

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<sup>644</sup> Kingsbury (2009) *European Journal of International Law* 16.

<sup>645</sup> Kingsbury (2009) *European Journal of International Law* 16.

<sup>646</sup> Kingsbury (2009) *European Journal of International Law* 16-17. Global administrative bodies can include: formal intergovernmental regulatory bodies, informal intergovernmental regulatory networks and coordination arrangements, national regulatory bodies operating with reference to an international intergovernmental regime, hybrid public-private regulatory bodies, and some private regulatory bodies exercising transnational governance functions of particular public significance.

<sup>647</sup> Kingsbury (2009) *European Journal of International Law*. The definition of global administrative law would cover most of global governance as “administrative action”, namely “rulemaking, administrative adjudication between competing interests, and other forms of regulatory and administrative decision and management”. Kingsbury describes what constitutes “administrative action” under domestic law as defined primarily in the negative — “state acts that are not legislative or judicial — and even though the boundaries between these categories are blurred at the margins”.

<sup>648</sup> Kingsbury (2009) *European Journal of International Law* 28-29.

“Three different normative conceptions of the role of global administrative law: *internal administrative accountability; protection of private rights or the rights of states; and promotion of democracy.*”<sup>649</sup>

The descriptions of global administrative law comprise some broad basic legal principles and requirements of both a procedural and a substantive nature, although the system is still fragmented and developing. The first foundational principle is a classic and largely uncontroversial feature of domestic administrative law. Procedural participation and transparency represents the right of affected individuals to have their views and relevant information considered before a decision is taken. Various versions of this principle are increasingly applied in global administrative governance. In the WTO Appellate Body decision in the *Shrimp–Turtle* case, it required the United States to provide mechanisms for procedural participation.<sup>650</sup> The United States had provided none of the states whose exports of shrimp products to the United States had been curtailed by domestic U.S. administrative regulations with a “formal opportunity to be heard, or to respond to any arguments that may be made against it”.<sup>651</sup>

Participation in global administrative proceedings has not been restricted to individuals or states affected by decisions. It is common practice for international bodies to include NGOs representing affected social and economic interests, in their work of standard-setting and rule-making.<sup>652</sup> Many of these NGOs apply pressure for access to information and “decisional transparency”, which is important in order for participation rights and rights of review to be exercised effectively. They also promote accountability by exposing administrative decision-making to public and peer scrutiny.<sup>653</sup>

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<sup>649</sup> Kingsbury (2009) *European Journal of International Law* 43 [emphasis added].

<sup>650</sup> WTO Appellate Body, United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R Doc. No. 98-3899 (Oct. 12, 1998) (*Shrimp–Turtle*).

<sup>651</sup> Kingsbury (2009) *European Journal of International Law* 38. See also N Woods & A Narlikar “Governance and the Limits of Accountability: The WTO, the IMF and the World Bank” 53 *International Social Science Journal* (2001) 569.

<sup>652</sup> For example the Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters, June 25, 1998, 38 I.L.M. 517 (entered in force Oct. 30, 2001).

<sup>653</sup> Kingsbury (2009) *European Journal of International Law* 38.

The second requirement is that of providing reasons for administrative decisions. This fundamental principle has also been extended from domestic law into some global and regional institutions. An entitlement to have a decision of a domestic administrative body affecting one's rights reviewed by a court or other independent tribunal is among the most widely accepted features of domestic administrative law, and this is to some extent reflected in global administration. This entitlement to review by national authorities was referred to in the *Shrimp-Turtle* decision.<sup>654</sup> Acceptance of the importance of review is reflected in the establishment of the World Bank Inspection Panel, and also in the right of appeal to the Court of Arbitration for Sport from doping decisions.<sup>655</sup>

Finally, the substantive standards that apply across domestic law and global administrative law are variable. Kingsbury argues:

“Especially when *individual rights* are placed at the forefront, global administrative law might be expected to embody substantive standards for administrative action, like those applied in a domestic context—such as *proportionality*, *rational relation between means and ends*, *use of less restrictive means*, or *legitimate expectations*”.<sup>656</sup>

Proportionality is a central issue in the jurisprudence of some international human rights regimes, as discussed above: in the ECHR, for example, interference with many individual rights can be justified, but only if (inter alia) the interference is proportionate to the legitimate public objective pursued.<sup>657</sup> The proportionality principle is reflected also in some national court decisions on global governance, such as a German court decision critical of a ruling by an international sports federation in a doping case because it imposed disproportionate sanctions.<sup>658</sup> Similarly, restrictions conflicting with the general rules of free trade under the GATT are allowed only if they meet certain requirements designed to ensure a rational fit between means and ends, and employ means that are not more trade-restrictive than reasonably necessary to accomplish the relevant regulatory

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<sup>654</sup> *Shrimp-Turtle* para 180.

<sup>655</sup> Kingsbury (2009) *European Journal of International Law* 39.

<sup>656</sup> Kingsbury (2009) *European Journal of International Law* [emphasis added].

<sup>657</sup> See above 5 3 2.

<sup>658</sup> Kingsbury (2009) *European Journal of International Law* 39.

objective. Yet in many other areas of global administration, the application of such requirements has so far been minimal.<sup>659</sup>

With the changing role of the nation state and the rise of the administrative state, responsibility for the welfare and development of its people is in the hands of a proactive, ever-expanding state. The inclusion of administrative justice and socio-economic rights in the South African Constitution entrenches the role of the state to provide access to housing, education, health care and so on, which mandates fall predominantly on the administration. The next section examines the role of administrative justice in socio-economic transformation, in a democratic developmental state.

## 5.5 Socio-economic transformation and administrative justice

Administrative law can be defined as “regulating the activities of bodies that exercise public powers or perform public functions, irrespective of whether those bodies are public authorities in a strict sense”.<sup>660</sup> As the definition states, the focus of administrative law takes a functional as opposed to an institutional approach, where it is the function of public administration rather than the institution of the public administration that is determinative of “administrative action”.<sup>661</sup> Branches of the state capable of performing “administrative action” are the “policy branch” of the executive, the “public administration”, the legislature and the judiciary.<sup>662</sup>

The “policy branch” of the executive refers to that part of the government concerned primarily with the formulation of policy and legislation;<sup>663</sup> those institutions responsible for implementation of legislation and policy are classified under the administration. The

<sup>659</sup> Kingsbury (2009) *European Journal of International Law* 41.

<sup>660</sup> C Hoexter *Administrative Law* 2 ed (2012) 2. Different definitions of administrative law abound. Some definitions attempt to distinguish between constitutional law and administrative law. See Corder “Administrative law in SA” in *Administrative Justice in SA* 2. See also Baxter *Administrative Law* 50-52. Baxter distinguishes the two subjects in terms of their emphasis: “while constitutional law is primarily concerned with the structure and distribution of governmental power, administrative law is *primarily* concerned with its *mode of exercise*.”

<sup>661</sup> G Quinot & P Maree “Administrative action” in G Quinot (ed) *Administrative Justice in South Africa* (2015) 66-94, 72. See *President of RSA v SARFU* 2000 (1) SA 1 (CC).

<sup>662</sup> Quinot & Maree “Administrative action” in *Administrative Justice in SA* 67-70.

<sup>663</sup> See M Vile (1998) *Constitutionalism and the Separation of Powers* 400, quoted in P Maree “Administrative authorities in legal context” in G Quinot *Administrative Justice in South Africa* (2015) 38.

“public administration” generally includes the organs and functionaries of the executive branch of the state responsible for the day-to-day implementation of law and the administration of policy – this includes all the government departments at national or provincial level. It also includes local government administrations, the security forces and “parastatal” organisations.<sup>664</sup> According to the Constitution, the public administration comprises the public service, or the employees of government departments.<sup>665</sup>

“Administrative action” refers broadly to the conduct of a public administration nature, and includes actions by natural or juristic persons “when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect ...”.<sup>666</sup> It is important to note that the actions of some private institutions and bodies – such as clubs and churches – may also qualify as administrative action, notwithstanding the fact that these bodies are not part of the public administration.<sup>667</sup> In the words of Nelson Mandela:

“Even the most benevolent of government are made up of people with all the propensities for human failings. The rule of law as we understand it consists in the set of conventions and arrangements that ensure that it is not left to the whims of individual rulers to decide on what is good for the populace. The administrative conduct of government authorities are subject to the scrutiny of independent organs. This is an essential element of good governance that we have sought to have built into our new constitutional order”.<sup>668</sup>

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<sup>664</sup> Hoexter *Administrative Law* 3: “These consist of public enterprises, regulatory boards, cultural bodies and other organisations wholly or partly controlled by government”, for example Telkom, Eskom, South African Broadcasting Corporation, the South African Law Commission and the Human Sciences Research Council. See also Baxter *Administrative Law* chapter eight.

<sup>665</sup> Section 197(1) of the Constitution.

<sup>666</sup> Section 1 of PAJA.

<sup>667</sup> Hoexter *Administrative Law* 3. See further discussion below.

<sup>668</sup> Address by President Nelson Mandela at the International Ombudsman Institute VIIth International Conference on Balancing the Exercise of Governmental Power and its Accountability, delivered at Durban 2000. Quoted in *South African Informal Traders Forum and Others v City of Johannesburg and Others*; *South African National Traders Retail Association v City of Johannesburg and Others* 2014 (6) BCLR 726 (CC) para 3. In this case, informal traders in the inner City of Johannesburg applied for urgent interim relief from the High Court and then the Constitutional Court when their right to dignity and right to trade was severely curtailed by the City officials and metro police. The court granted the relief sought on the basis that their conduct had “spawned immediate and acute hardship that left the applicant traders destitute” (para 36); and affected the rights of their children to basic nutrition, shelter and basic health care services (para 31).

The institutional accountability, of which Mandela speaks, is of critical importance in a democratic developmental state built on a transformative Constitution. The administrators and decision-makers that distribute public goods must be accountable in a constitutional democracy. This is also distinctive of a participatory democracy where people are entitled to have a say in the decisions that directly affect them. With the inclusion of the right to administrative justice in the Constitution, administrative law has evolved into a set of legal rules aimed at realising administrative justice. At the same time, it must be understood that unlike administrative law under the common law, administrative law in the service of administrative justice is about more than judicial review. Although judicial review is a critical process for accountability, there are many other routes and mechanisms just as important to realising the right to administrative justice.<sup>669</sup> This expansive role for administrative justice is imperative in a democratic developmental state that requires good governance and efficient public administration, in order to bring about socio-economic transformation.

The challenge for lawyers, practitioners and proponents of administrative justice, is to inculcate principles and guidelines for the behaviour of public servants engaged in the exercise of public power in a democratic developmental state.<sup>670</sup> The courts can assist by promoting administrative justice principles in their judgements and remedies; academic and training institutions can educate lawyers and public officials. Other avenues for achieving administrative justice besides the courts include specialised ombuds offices, appeals tribunals and so on.

Due to the applicability of administrative justice to a wide spectrum of topics, as discussed above, the South African courts have considered a significantly large number of cases under the administrative justice rubric in the South African Constitution, and the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”), since 1994. Notably, these cases have included, in a range of selected areas, the use of the right to just administrative action to both advance the interests of and protect the poor. The history, scope of

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<sup>669</sup> See G Quinot (ed) *Administrative Justice in South Africa* (2015) xv.

<sup>670</sup> Corder “Administrative law in SA” in *Administrative Justice in SA* 25.

application, and content of the requirements under this right are outlined below and the interpretation of the right in cases related to realisation of socio-economic rights for the poor and vulnerable, is discussed further in chapter six.

## 5.5.1 The Constitution, PAJA and the common law

South Africa has a long history of abuse of government power, characterised by “executive authority” and a wide range of discretionary powers granted to government officials. In addition, the authority of the courts under the common law to review the exercise of this discretion was extremely limited by the constitutional system of “parliamentary sovereignty”.<sup>671</sup>

The Constitution of the Republic of South Africa Act 200 of 1993 (“the Interim Constitution”) established the right to administrative justice (section 24),<sup>672</sup> within a system of constitutional supremacy. Section 24 of the Interim Constitution changed the position of common law. In *Pharmaceutical Manufacturers Association of South Africa: In Re Ex Parte President of the Republic of South Africa*<sup>673</sup> (“*Pharmaceutical Manufacturers*”) the Constitutional Court held that there is only one system of administrative law, which is shaped by and subject to the Constitution and rejected the notion that judicial review under the Constitution and the common law are different concepts.<sup>674</sup> The Constitution requires the administration to act in accordance with fundamental principles of justice, fairness and reasonableness. The court further clarified that the power of the courts to review administrative action is also now derived from the Constitution.<sup>675</sup>

<sup>671</sup> C Hoexter “Just Administrative Action” in I Currie & J De Waal *The Bill of Rights Handbook* 6 ed (2013) 643; O’Regan (2004) SALJ 424.

<sup>672</sup> Section 24 stated:

Every person shall have the right to-

- (a) lawful administrative action where any of his or her rights or interests is affected or threatened;
- (b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;
- (c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and
- (d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened.

<sup>673</sup> 2000 (3) BCLR 241 (CC).

<sup>674</sup> Para 33.

<sup>675</sup> Para 45.



Administrative law is now firmly grounded as a constitutional concept in South Africa in section 33 of the Constitution, the right to “just administrative action”. The constitutional right requires administrative action to be lawful, reasonable and procedurally fair (s 33(1)), and includes the right to be given reasons for administrative action (s 33(2)). Section 33(3) places a further obligation on the State to enact legislation to give effect to these rights in order to provide for judicial review of administrative action and to promote an efficient administration. This is also a critical element of a democratic developmental state where efficient institutional capacity of the courts, the executive and the administration, is required to ensure delivery of public goods and accountability over such delivery.

Following the decision in the *Pharmaceutical Manufacturers* case, the Promotion of Administrative Justice Act was enacted to “give effect to” the constitutional right to just administrative action.<sup>676</sup> It is the legislative basis for the review of administrative action and sets out procedures to be followed by administrators before taking certain decisions or making certain rules. The purpose of administrative justice and PAJA is to ensure the government is democratic, accountable, open and transparent. As Skweyiya J stated in *Joseph v City of Johannesburg*<sup>677</sup> (“*Joseph*”):

“The preamble of PAJA gives expression to the role of administrative justice and provides that the objectives of PAJA are *inter alia* to “promote an efficient administration and good governance” and to “create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function”. These objectives give expression to the founding values in section 1 of the Constitution, namely that South Africa is founded on the rule of law and on principles of democratic government to ensure accountability, responsiveness and openness.”<sup>678</sup>

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<sup>676</sup> The Act came into operation on 30 November 2000 (Proclamation R73 of 29 November 2000), with the exceptions of ss 4 and 10. These sections came into effect on 31 July 2002 (Proclamation R63 of 24 July 2003).

<sup>677</sup> 2010 (3) BCLR 212 (CC).

<sup>678</sup> Para 43 (footnote omitted).

This resonates with a democratic developmental state, striving to address poverty and inequality in a structural and substantive manner through the participation and empowerment of poor and vulnerable people. A democratic developmental state requires “active democratic structures” such as the courts, to provide an avenue to hold the administration and the executive accountable for the efficient delivery of public goods to people in need of them. Both the courts and the public administration require the relevant institutional legitimacy and capacity in order to fulfil these objectives, values and principles of our democratic constitutional order.

It is important to bear in mind that the PAJA is general administrative law, which supplements all other legislation empowering particular administrative action. Since the enactment of PAJA, the rights to just administrative action in the Constitution, though foundational, largely play an indirect role in judicial review to interpret the PAJA in a manner that conforms to section 33.<sup>679</sup> In addition, in the spirit of constitutional supremacy, if any aspect of PAJA unjustifiably limits the constitutional right to administrative justice, it can be contested as an infringement of section 33.<sup>680</sup>

## 5 5 2 The scope of administrative law

The scope of administrative law, in particular the meaning of “administrative action” and the question of the relationship between the PAJA definition of “administrative action” and the meaning of “administrative action” in section 33 of the Constitution, is the subject of much contention.<sup>681</sup>

According to the body of jurisprudence interpreting the right to lawful, procedurally fair and justifiable administrative action under section 24 of the interim Constitution (in

<sup>679</sup> Hoexter “Just Administrative Action” in *Bill of Rights Handbook* 643.

<sup>680</sup> O'Regan laid this out in *Bato Star Fishing v Minister of Environmental Affairs and Tourism* 2004 (4) 490 (CC) para 25: “The Courts’ power to review administrative action no longer flows directly from the common law but from PAJA and the Constitution itself. The groundnorm of administrative law is now to be found in the first place not in the doctrine of ultra vires, nor in the doctrine neither of parliamentary sovereignty, nor in the common law itself, but in the principles of our Constitution. The common law informs the provision of PAJA and the Constitution, and derives its force from the latter. The extent to which the common law remains relevant to administrative law review will have to be developed on a case-by-case basis as the Courts interpret and apply the provisions of PAJA and the Constitution.”

<sup>681</sup> See C Hoexter “Administrative action’ in the courts” (2006) *Acta Juridica* 303.

operation between 1994 and 2000), “administrative action” is “the exercise of public power by all organs of state except the following: the legislatures (national, provincial, local) when exercising their legislative functions”;<sup>682</sup> “the judiciary, when exercising judicial functions”;<sup>683</sup> “the President when exercising the constitutional powers of the head of state”<sup>684</sup> (and similarly, “the Premiers of Provinces exercising their constitutionally enumerated powers”<sup>685</sup>);<sup>686</sup> and “the cabinet and provincial cabinets (when making political decisions)”.<sup>687</sup> The jurisprudence of the Constitutional Court on the meaning of “administrative action” is based primarily on a distinction between policy development and legislative activity and the implementation of legislation, the latter being administrative action. It is important to note at this point that socio-economic rights jurisprudence has challenged both policy formulation and legislative activity, to greater and lesser extents, and this is complementary to the role that administrative justice can play in challenging policy and legislation implementation in relation to socio-economic transformation, in a democratic developmental state.

The definition of “administrative action” in the PAJA is markedly more complex than the right to administrative justice provided for in the Constitution.<sup>688</sup> Firstly, the definition delineates whose decisions may be the subject of judicial review of administrative action: “organs of state” including departments at national, provincial or local government level;

<sup>682</sup> *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metro Council* 1998 (12) BCLR 1458 (CC).

<sup>683</sup> *Nel v Roux NO* 1996 (3) SA 562 (CC); *Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd* 2002 (4) SA 661 (SCA) .

<sup>684</sup> Sections 84 and 85 of the Constitution set out the powers, functions and executive authority of the President.

<sup>685</sup> Sections 125 and 127 of the Constitution set out the powers, functions and executive authority of Premiers.

<sup>686</sup> *Pharmaceutical Manufacturers Association of South Africa: In Re Ex Parte President of the Republic of South Africa* 2000 (3) BCLR 241 (CC); *President of the RSA and Others v SARFU and Others* 1999 (10) BCLR 1059 (CC).

<sup>687</sup> The Head of State and Cabinet are excluded because they are endowed under the Constitution with political (policy) and not administrative authority. *Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College (PE) (Section 21) Inc* 2001 (2) BCLR 118 (CC) para 21.

<sup>688</sup> “[A]dministrative action” means any decision taken, or any failure to take a decision, by –

- (a) an organ of state, when –
  - (i) exercising a power in terms of the Constitution or a provincial constitution; or
  - (ii) exercising a public power or performing a public function in terms of any legislation; or
- (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect...”

and natural or juristic persons exercising public power or performing a public function.<sup>689</sup> The PAJA also specifically excludes some of the actions of particular organs of state from the definition of administrative action - and these are therefore not governed by the Act. Most of these excluded actions are governed directly by the Constitution and have their own specific rights, procedures and remedies. The actions which are excluded are: policy decisions of the executive; the making of legislation by Parliament, a provincial legislature or a municipal council; the exercise of judicial functions by the officers of courts and some other bodies; and decisions taken under the Promotion of Access to Information Act (Act No. 2 of 2000) to either allow or deny access to information.

Secondly, the Act confines administrative action to “decisions” or “failure to take decisions”, instead of “conduct” of the administration. The Act contains a complicated definition of “decision”.<sup>690</sup> One of the grey areas in the Act relates to whether the Act applies to the making of delegated legislation. In *Minister of Home Affairs v Eisenberg and Associates* (“*Eisenberg*”) it was stated: “The definition of ‘decision’ does not refer to the making of regulations and it is not clear whether this constitutes administrative action for the purposes of PAJA.”<sup>691</sup> Further on, however, the Court asks whether “a construction of PAJA that excludes the making of regulations from the ambit of administrative action would be consistent with the Constitution.”<sup>692</sup> In the case of *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others*<sup>693</sup> (“*New Clicks*”), the validity of regulations made by the Minister of Health, on the recommendation of the Pricing

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<sup>689</sup> In Section 239 of the Constitution, organs of state also include “functionaries or institutions exercising a power or performing a function in terms of any legislation”, such as universities.

<sup>690</sup> “[D]ecision’ means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to –

- (a) making, suspending, revoking or refusing to make an order, award or determination;
- (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
- (c) issuing, suspending, revoking or refusing to issue a license, authority or other instrument;
- (d) imposing a condition or restriction;
- (e) making a declaration, demand or requirement;
- (f) retaining, or refusing to deliver up, an article; or
- (g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly.”

<sup>691</sup> 2003 (5) SA 281 (CC) para 52.

<sup>692</sup> Para 53 fn 30.

<sup>693</sup> 2006 (8) BCLR 872 (CC).

Committee, to give effect to the pricing system for the sale of medicines, were challenged. The court split on the question of whether PAJA applied to the recommendations of the Pricing Committee and to the subsequent making of regulations by the Minister.<sup>694</sup> Chaskalson CJ, Langa DCJ, Ngcobo, O'Regan and Van der Westhuizen JJ held that PAJA is applicable. The reasoning of Chaskalson CJ and Ngcobo J differs in that Chaskalson CJ decided that PAJA applies to the making of *all* regulations, while Ngcobo J decided the matter narrowly in respect of the powers in issue in this case, and leaves the question whether PAJA applies to all regulation-making open.<sup>695</sup> Sachs J held that the Act is applicable to the issue of the dispensing fee only and that the general regulatory scheme is governed by the principles of legality.<sup>696</sup> Moseneke, Madala, Mokgoro, Skweyiya and Yacoob JJ held that it was not necessary to decide the issue of the applicability of PAJA, since they found the procedure followed to be fair.<sup>697</sup>

Thirdly, the decision must be made under an “empowering provision”.<sup>698</sup> This establishes clearly that administrative action includes the implementation of other forms of law besides legislation.

Then the decision taken must “adversely affect rights”. This is one of the most significant limitations of the scope of the PAJA and circumscribes where it intersects with socio-economic rights. This includes decisions that: require someone to do something, to tolerate something or not to do something; limit or remove someone's rights; or say someone does not have a right to something. This is called an “adverse determination of a person's rights”.<sup>699</sup> A decision can “affect” a person's rights in one of two ways: the decision could deprive a person of their existing rights;<sup>700</sup> or it could affect a person's

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<sup>694</sup> Para 13 – provides a summary of the issues raised and the conclusions reached by the Court.

<sup>695</sup> Para 13.

<sup>696</sup> Para 13.

<sup>697</sup> Para 13. *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* 2010 (3) SA 589 (SCA) where the SCA held rule-making to be subject to PAJA. See also G Quinot “Administrative law” (2010) *Annual Survey of South African Law* 41 – 76.

<sup>698</sup> Section 1: “‘empowering provision’ means a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken.”

<sup>699</sup> I Currie *The Promotion of Administrative Justice Act: A Commentary* 2 ed (2007) 74-81.

<sup>700</sup> For example *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxusa* 2001 (4) SA 1184 (SCA) .

right by determining what those rights are. An example is where someone applies for a Child Support Grant and the administrator decides not to grant approval for it. The PAJA uses the term in both of these senses. In other words, decisions that deprive someone of rights, and those that determine that person's rights are both “administrative action”.<sup>701</sup>

Finally, a decision must have legal effect, the effect must be direct, and it must be external. This means that to meet the requirements of “administrative action”, a decision must have a real impact on a person's rights. It must be a legally binding determination of someone's rights or obligations. Put another way, a decision must establish what someone's rights or obligations are, or must change or withdraw them; and the decision must be a final one.<sup>702</sup> In *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo*<sup>703</sup> (“*Hoërskool Ermelo*”), the Court characterised the dispute as being about the issues of legality and administrative justice in relation to “the right to receive education and the obligations of the state to ensure that the right is given effect to in public schools”.<sup>704</sup>

Hoexter has critiqued PAJA for severely circumscribing the realm of administrative action via its elaborate statutory definition in section 1. She is pessimistic about the overly complex and narrow definition of “administrative action” in PAJA and the consequent struggle of the courts in applying this definition. Her analysis shows that most of the courts dealing with administrative law post-PAJA have spent a disproportionate amount of interpretive energy considering whether the statutory definition is satisfied or not, before they can proceed with the substantive considerations of the merits of the cases. Hoexter argues further that far too much of the action has not fallen within this strict definition. This definition has thus unduly limited the potential impact of the administrative justice provision in section 33 of the Constitution, as the Act is now the primary pathway to judicial review in administrative law. It has also distracted the courts

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<sup>701</sup> See *Walele v City of Cape Town* 2008 (11) BCLR 1067 (CC); and *Grey's Marine Hout Bay and Others v Minister of Public Works and Others* 2005(6) SA 313 (SCA).

<sup>702</sup> PAJA s 1(b).

<sup>703</sup> 2010 (3) BCLR 177 (CC) para 32.

<sup>704</sup> Para 39-40, 43.

from dealing with the substance of administrative law and the content of the right to administrative justice. She states that “substance can become form; cases that ought to be and really are about fairness or reasonableness can become cases about administrative action.”<sup>705</sup>

The substantive and participatory elements of the right to just administrative action play an important role in a democratic developmental state, and are discussed in the next section. The courts’ interpretation of the application of the right is thus critical. The intersection between socio-economic rights and administrative justice, in cases that have come before the courts and which Quinot and Liebenberg refer to as “overlap” cases, will also be discussed further below, and in chapter six. These cases demonstrate the substantive complementarity between administrative justice and socio-economic rights towards achieving socio-economic transformation in a South African democratic developmental state.

### 5 5 3 The content of the right to administrative justice: Substance and participation

Section 33(1) of the Constitution establishes a right to administrative action that is “lawful, reasonable and procedurally fair”. The jurisprudence on the right to just administrative action has helped to flesh out the substantive content of the right, and in cases where the duties overlap with socio-economic rights, has lent itself to a compatible, substantive interpretation of both sets of rights. The substantive interpretation of the elements of the right to administrative justice - lawfulness, the principle of legality, reasonableness, and procedural fairness - reinforces the participatory and accountability aspects of a democratic developmental state aimed at achieving socio-economic transformation.

### 5 5 3 1 Lawfulness and the principle of legality

Hoexter defines the requirement of “lawfulness” as:

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<sup>705</sup> Hoexter (2006) *Acta Juridica* 312.



“‘Lawful’ administrative action means in essence that administrative actions and decisions must be *duly authorised by law* and that any *statutory requirements or preconditions that attach to the exercise of the power must be complied with*.”<sup>706</sup>

Hoexter explains that there are many grounds of review that give content to the idea of lawfulness, arising from the common law, the constitutional right to administrative justice, and PAJA itself.<sup>707</sup> These grounds are overlapping and have been variously classified. She classifies them according to three main themes of legality: the requirement of *authority*, the concept of *jurisdiction* and abuse of *discretion*.<sup>708</sup> A discussion of all these grounds is unnecessary for the purposes of this dissertation, however, the area of interest and relevance for a democratic developmental state is the way in which the courts have used the broader, encompassing concept of legality itself, in cases relating to administrative justice and socio-economic rights.<sup>709</sup>

In the pre-democratic era the principle of legality was the idea that administrators had to act lawfully, or as described by Baxter, it was simply the opposite of the *ultra vires* doctrine.<sup>710</sup> In the post-democratic period, the common law notion of legality is still found in our law today, but in a different format captured in the administrative justice clause of the Constitution and in PAJA. The main difference is that in the context of administrative law, the content of legality has been made explicit in section 33 of the Constitution which specifically requires administrative action to be lawful, reasonable and procedurally fair, and to give reasons in certain circumstances, and it has been concretised in the list of grounds of review in section 6 of PAJA.

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<sup>706</sup> Hoexter (2006) *Acta Juridica* 314 [emphasis added].

<sup>707</sup> Hoexter (2006) *Acta Juridica* 253-255.

<sup>708</sup> Hoexter (2006) *Acta Juridica* 254.

<sup>709</sup> See for example, in *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (3) BCLR 177 (CC) para 43, the Court raised the issues of legality and administrative justice in relation to the right to education. See discussion further below.

<sup>710</sup> Hoexter *Administrative Law* 122. Baxter *Administrative Law* 301.

But legality also has a broader meaning. It refers to the constitutional principle of legality that applies to the use of *all* public power, beyond administrative action.<sup>711</sup> Hoexter describes it thus:

“This principle of legality (or ‘legality and rationality’)<sup>712</sup> is an aspect of the rule of law, a concept implicit in the interim Constitution and a founding value of our constitutional order in terms of section 1(c) of the 1996 Constitution. The fundamental idea it expresses is that ‘the exercise of public power is only legitimate where lawful’. Its detailed content has to be worked out from the Constitution as a whole, and this is a continuing process that the Constitutional Court embarked on in a series of cases involving non-administrative action.”<sup>713</sup>

In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metro Council*<sup>714</sup> (“*Fedsure*”) the Court described the principle of legality as an aspect of the rule of law. It held that the principle implied that a body exercising public power, such as a municipality making original legislation, “had to act within the powers lawfully conferred to it”.<sup>715</sup> In *Pharmaceutical Manufacturers and President of the RSA v SARFU*<sup>716</sup> (“*SARFU*”), near-legislative action was the issue and the Court said that the principle required that the exercise of public power should not be arbitrary or irrational. Chaskalson P said:

“It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given; otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least,

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<sup>711</sup> *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metro Council* 1998 (12) BCLR 1458 (CC) para 49; *Minister of Public Works v Kyalami Ridge Environmental Association (Mukhwevho Intervening)* 2001 (7) BCLR 652 (CC) para 54; *Electronic Media Network Limited v e.tv (Pty) Limited* 2017 (9) BCLR 1108 (CC) paras 22, 25, 26. The rule of law also applies to judicial authority, see *S v Mabena* 2007 (1) SACR 482 (SCA).

<sup>712</sup> *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) para 78.

<sup>713</sup> Hoexter *Administrative Law* 122. See also C Hoexter “The rule of law and the principle of legality in South African administrative law today” in M Carnelley & S Hoctor (eds) *Law, Order and Liberty: Essays in Honour of Tony Mathews* (2011) 55.

<sup>714</sup> 1998 (12) BCLR 1458 (CC) paras 56 and 58.

<sup>715</sup> Hoexter *Administrative Law* 123.

<sup>716</sup> 1999 (10) BCLR 1059 (CC).

comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.”<sup>717</sup>

In *Albutt v Centre for the Study of Violence and Reconciliation*<sup>718</sup> (“*Albutt*”) the Constitutional Court also discussed procedural fairness as a requirement of rationality, under the principle of legality. The Court in this case, held that it would be irrational for the President to grant pardons for politically motivated offenders, without hearing the victims of the offences. Similarly in *Electronic Media Network Limited v e.tv (Pty) Ltd*<sup>719</sup> (“*Electronic Media Network*”), e.tv challenged the Minister of Communications for not consulting appropriately on a policy amendment. The majority judgement acknowledged that the policy domain is the exclusive jurisdiction of the executive arm of government but held that the Minister’s policy amendment could properly be reviewed under the constitutional principle of legality.<sup>720</sup> Mogoeng CJ stated:

“Consultation is not an inconsequential process or a sheer formality, particularly in relation to national policy development. It exists to facilitate a festival of ideas that would hopefully provide some enlightenment on the stakeholders’ major perspectives so that policy-formulation is as informed as possible for the good of all, not some.”<sup>721</sup>

There is also evidence of judicial support for the principle of legality requiring the giving of reasons.<sup>722</sup> The principle of legality thus incorporates elements of participatory democracy and justification of public power.

However, although *Albutt* invited this via rationality, the court was explicit that it was only doing so based on the facts in the particular case. There have been a number of recent decisions where the courts have had to decide whether or not to impose procedural fairness standards upon exercises of public power that do not amount to

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<sup>717</sup> Para 85.

<sup>718</sup> 2010 (5) BCLR 391 (CC).

<sup>719</sup> [2017] ZACC 17 paras 22, 26.

<sup>720</sup> Paras 22, 26.

<sup>721</sup> Para 38.

<sup>722</sup> *Wessels v Minister of Justice and Constitutional Development* 2010 (1) SA 128 (GNP).

administrative action.<sup>723</sup> *Masetlha v President of the RSA* (“*Masetlha*”) suggested that it is not always appropriate to subject public power that is not administrative action to the rigours of notice and provide opportunity to make representations.<sup>724</sup> For example judicial and legislative conduct already make provision for procedural fairness, such that it already ensures transparency and accountability. However it is more complex in relation to executive conduct.<sup>725</sup> It may sometimes be undesirable to impose procedural fairness requirements on the political discretion of a decision-maker, for example where issues of national security are concerned.

Although there is still uncertainty with regard to the requirements of legality, and whether or not and to what extent legality requires procedural fairness, it is now clear that there are times when exercises of public power that are not administrative action, must follow a fair process in order to be rational or lawful. The exact parameters of procedural fairness in these circumstances, has not yet been clearly articulated.<sup>726</sup> With respect to executive conduct, the Constitution also requires policy-making to incorporate procedural and participatory opportunities, where policy-making in the narrow sense of implementation is concerned, there may be overlap in such circumstances with the requirements of “meaningful engagement” as devised by the courts in the socio-economic rights jurisprudence. Whether under the principle of legality or “meaningful engagement”, the transparency and accountability created through procedural and participatory requirements, is to be welcomed in a democratic developmental state. There should be minimal and exceptional instances where this is not the case.

Hoexter characterises the requirements of lawfulness in relation to administrative action under section 33(1) of the Constitution and the PAJA, as coinciding completely with the content of the constitutional principle of legality. She states that “[t]his principle is an

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<sup>723</sup> See for example *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC); *Minister of Home Affairs v Scalabrini Centre* 2013 (6) SA 421 (SCA); *National Director of Public Prosecutions v Freedom Under Law* 2014 (4) SA 298 (SCA); and *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC); *Electronic Media Network Limited v e.tv (Pty) Limited* 2017 (9) BCLR 1108 (CC).

<sup>724</sup> 2008 (1) SA 566 (CC) paras 42, 77-78.

<sup>725</sup> See M Murcott “Procedural Fairness as a Component of Legality: Is a Reconciliation between *Albutt* and *Masetlha* Possible?” (2013) 130(2) *SALJ* 260, 271-272.

<sup>726</sup> Murcott (2013) *SALJ* 269-270.

aspect of the rule of law”, and “is one of the founding values of our constitutional order and the ‘mainspring’ of administrative law”.<sup>727</sup> The principle of legality is also implicit in the South African Constitution<sup>728</sup> and “provides a general justification for the review of exercises of public power”.<sup>729</sup> She states that it is a “fourth pathway to review”, thus providing an additional avenue of review when action does not qualify as administrative action for the purposes of the PAJA or the Constitution.<sup>730</sup> Hoexter argues that, due to the unwieldy definition of “administrative action” in PAJA, courts have used the principle of legality “as a residual pathway to review”.<sup>731</sup> This avoidance of PAJA, she says, is made easier by the growing overlap between “regular” administrative law and the principle of legality.<sup>732</sup> For example, the principle of legality played an important role in both the majority and the dissenting judgments in *New Clicks*<sup>733</sup> where there was a reluctance to engage with the statutory definition of administrative action.<sup>734</sup>

At the same time, Hoexter goes on to explain that the principle has evolved in a number of cases decided by the Constitutional Court, and has great potential to evolve considerably further, to perhaps even cover all grounds of review under administrative law.<sup>735</sup> It has been interpreted as covering all the grounds ordinarily associated with authority, jurisdiction and abuse of discretion. In *Affordable Medicines* and *New Clicks*, it assisted the court in applying administrative law principles to non-administrative action, which makes the principle of legality very attractive in its potential.<sup>736</sup> Sachs J described legality in a minority judgment in *New Clicks* as “an evolving concept in our

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<sup>727</sup> Hoexter *Administrative Law* 121, 254.

<sup>728</sup> *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metro Council* 1998 (12) BCLR 1458 (CC) paras 58-59.

<sup>729</sup> Hoexter *Administrative Law* 121.

<sup>730</sup> Hoexter *Administrative Law* 254. *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (8) BCLR 872 (CC) paras 97, 144. See also Hoexter “Just Administrative Action” in *Bill of Rights Handbook* 643.

<sup>731</sup> Hoexter *Administrative Law* 314.

<sup>732</sup> Hoexter *Administrative Law* 134.

<sup>733</sup> 2006 (8) BCLR 872 (CC).

<sup>734</sup> In the High Court judgment, Yekiso J points out that the reference to “lawfulness” in section 33(1) “is an all embracing and an umbrella concept that encapsulates all the requirements for administrative ‘legality’, including all those requirements and grounds for invalidity set out in section 6 of the Promotion of Administrative Justice Act”. *New Clicks South Africa (Pty) Ltd v Tshabalala-Msimang & Another NNO* 2005 (2) SA 530 (C) para 61.

<sup>735</sup> Hoexter *Administrative Law* 254.

<sup>736</sup> Hoexter *Administrative Law* 255.

jurisprudence, whose full creative potential will be developed in a context-driven and incremental manner”.<sup>737</sup>

The Court in *Hoërskool Ermelo* raised the issues of administrative justice and legality, and PAJA did not feature. The court held in this case that under the South African Schools Act 84 of 1996, the administrator was not empowered to appoint a committee to decide a school language policy, except when the school governing body no longer performed this function. Though the Head of Department (‘HOD’) certainly had the power to withdraw this policy-deciding function from the school governing body in particular circumstances, and though he was also empowered to appoint others to perform functions that the governing body had failed to perform, the two powers were unrelated and could not be “selectively or collectively applied to achieve a purpose not authorised by the statute”. The case was thus decided upon the basis that the administrator went beyond the authority expressly or impliedly conferred on them, and contravened those powers. This was decided under the rubric of legality, rather than administrative action.

However, Hoexter cautions that it is constitutionally sounder to refer to PAJA and section 33 before relying on the broad constitutional principle of legality.<sup>738</sup> The danger is that it could easily develop into what Hoexter describes as a “parallel universe of administrative law”.<sup>739</sup> In the recent SCA case of *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd*<sup>740</sup> (“Gijima”), the court ruled that legality review is not available when PAJA applies. There will no doubt be further development and application of the principle of legality and incorporation of the regular rules of administrative law in the realm of non-administrative action, in cases where PAJA does not apply due to the narrowness of the definition of administrative action in PAJA.

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<sup>737</sup> Para 614, with reference to the unanimous judgment of O’Regan J in *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (4) BCLR 301 (CC) paras 85-6.

<sup>738</sup> Hoexter *Administrative Law* 255.

<sup>739</sup> Hoexter *Administrative Law* 133, 119. This runs counter to the principle of subsidiarity and threatens the unity of administrative law.

<sup>740</sup> 2017 (2) SA 63 (SCA).

The principle of legality can bring about positive development under the rule of law, including in cases involving administrative justice and socio-economic rights, due to it being simple, general and inclusive. The principle of legality can be a safeguard for action that does not fit the complex definition of administrative action under section 33 or PAJA, and thereby enable the courts to still hold those who wield public power accountable for their actions in a democratic developmental state.

### 5.5.3.2 Reasonableness

In South African administrative law, the requirement of “reasonable” administrative action has had a complex history. Two related doctrines assuaged review for unreasonableness at common law. Firstly, the doctrine of *symptomatic unreasonableness* meant that unreasonableness was only a reviewable defect in so far as it points to some other reviewable defect in a decision, such as abuse of discretion. This initial prevailing standard of reasonableness was captured in *Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Africa) Ltd*<sup>741</sup> (“*Union Steel*”). Secondly, the degree of unreasonableness must be egregious. This standard originates in the English case of *Associated Provincial Picture Houses Ltd v Wednesbury*<sup>742</sup> (“*Wednesbury*”) where Lord Greene distinguished between two senses of “unreasonableness”: illegality and irrationality. He emphasised that it is not the place of the courts however, to substitute their view for that of the administrative body and instead designed a standard that courts may only intervene where the challenged decision is “so unreasonable that no reasonable body could have made it”.<sup>743</sup>

Over time, this test came under increasing criticism and the European Court of Justice (ECJ) developed the “proportionality test” instead. Basically, proportionality requires that

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<sup>741</sup> *Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Africa) Ltd* 1928 AD 220. “[U]nreasonableness [must be]... so gross that something else can be inferred from it, either that is ‘inexplicable except on the assumption of mala fides or ulterior motive’... or that it amounts to proof that the person on whom the discretion is conferred, has not applied his mind to the matter.”

<sup>742</sup> 1947 (2) All ER 680.

<sup>743</sup> At 302.



a proper balance be struck between the objective that the public body is pursuing, and the measures it adopts.<sup>744</sup> In general, the ECJ formulates this stringent test as follows:

“[T]he measures adopted must be appropriate and necessary in order to achieve the objectives legitimately pursued and, where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.”<sup>745</sup>

Finally, in *R v Chief Constable of Sussex, ex parte International Traders Ferry Ltd*<sup>746</sup> (“*Traders Ferry*”), English judges held that the *Wednesbury* test is too deferential and suggested a more appropriate test would be whether the decision was one that a reasonable authority could have reached.

The entrenchment of the constitutional right to just administrative action has overridden these two doctrines. The 1993 Constitution introduced the right to administrative action that is justifiable in relation to the reasons given for it, in section 24(d). Despite the apparently deliberate exclusion of the word “reasonableness” in section 24,<sup>747</sup> commentators interpreted the standard under section 24(d) as being one of “reasonableness”.<sup>748</sup> Case law that appeared at this stage specifically recognised the substantive dimension of review.<sup>749</sup> The judgment of Froneman DJP in *Carephone (Pty) Ltd v Marcus NO*<sup>750</sup> (“*Carephone*”) described section 24(d) as introducing “a requirement of rationality in the merit or outcome of the administrative decision” which “goes beyond mere procedural impropriety as a ground for review, or irrationality only as evidence of procedural impropriety”.<sup>751</sup> Quinot and Liebenberg explain that Froneman DJP clearly had a substantive standard in mind, when he formulated the judicial enquiry under the

<sup>744</sup> M Wesson “Grootboom and beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court” (2004) 20 SAJHR 284-307, 290.

<sup>745</sup> *R v Minister for Agriculture, Fisheries and Food, ex parte Fedesa* 1990 ECR 4023 para 14.

<sup>746</sup> *R v Chief Constable of Sussex, ex parte International Traders Ferry Ltd* 1999 (1) All ER 129 (HL) 157.

<sup>747</sup> E Mureinik “A Bridge to Where? Introducing the Interim Bill of Rights” (1994) 10 SAJHR 31, 40 note 34.

<sup>748</sup> Quinot & Liebenberg (2011) *Stellenbosch Law Review* 642; J Klaaren “Administrative Justice” in M Chaskalson et al *Constitutional Law of South Africa* (1999) 25-20; Currie & De Waal *Bill of Rights Handbook* 643-690.

<sup>749</sup> Quinot & Liebenberg (2011) *Stellenbosch Law Review* 642.

<sup>750</sup> 1999 3 SA 304 (LAC).

<sup>751</sup> Para 31.

standard of rationality as the judge will have to evaluate the merits of the matter, “not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable.”<sup>752</sup>

Quinot and Liebenberg explain further that in this judgment, Froneman DJP applied a standard of review that went beyond a purely procedural one, to involve a consideration of the substance of the case, what Froneman DJP referred to as “substantive rationality”.<sup>753</sup> This means that the substantive merits of the decision must be evaluated against the information - the facts and the law – that was used to justify the specific outcome. This standard, they argue, implies a variability that ranges from rationality to proportionality, depending on the circumstances of the case.<sup>754</sup> *Roman v Williams NO* (“*Roman*”) expanded the section 24(d) standard further by including the requirements of “suitability, necessity and proportionality” which therefore entailed “proportionality between the means and the end”.<sup>755</sup>

However, the majority judgment in *Bel Porto School Governing Body v Premier, Western Cape*<sup>756</sup> (“*Bel Porto*”) held that section 24 had not bestowed “substantive fairness” into our law as a criterion upon which to base a judgment as to whether administrative action is valid or not.<sup>757</sup> The Court further noted with concern, that such a standard would require judges to delve into policy matters that according to the separation of powers, should best be left to the political and administrative decision-makers.<sup>758</sup> The majority Court held that the appropriate standard was whether there was “a rational decision taken lawfully and directed to a proper purpose”.<sup>759</sup> Currie and de Waal nevertheless suggest that the majority of the court in this case could be said to have supported what appears to be a flexible standard of reasonableness review.<sup>760</sup> Chaskalson P appears to approve the

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<sup>752</sup> Para 36.

<sup>753</sup> Para 37. Quinot & Liebenberg (2011) *Stellenbosch Law Review* 643.

<sup>754</sup> Quinot & Liebenberg (2011) *Stellenbosch Law Review* 643.

<sup>755</sup> 1998 1 SA 270 (C) 284H-285A. Quinot & Liebenberg (2011) *Stellenbosch Law Review* 643.

<sup>756</sup> 2002 (9) BCLR 891 (CC).

<sup>757</sup> Para 88.

<sup>758</sup> Para 88.

<sup>759</sup> Para 89.

<sup>760</sup> Hoexter “Just Administrative Action” in *Bill of Rights Handbook* 643.

approach of the English courts enunciated by Lord Cooke in *Trader's Ferry*, namely that “the intensity of review ... will depend upon the subject matter in hand”.<sup>761</sup> This could mean, continued Chaskalson P, that the “intensity of review in cases involving the infringement of particular rights may require a stricter standard than rationality.”<sup>762</sup> The minority on the other hand, adopted a much more substantive test, which later provided a legal basis for a substantive contextual conception of reasonableness under section 33 of the Constitution and PAJA in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*<sup>763</sup> (“*Bato Star*”).

Section 33 of the Constitution requires that all administrative action must be reasonable.<sup>764</sup> However, there is no specific statutory entrenchment in the PAJA of the right to reasonable administrative action. The SA Law Commission’s draft Bill proposed that unreasonableness review should consist of two grounds of review: firstly that of rationality review, and secondly that of proportionality review similar to the general limitations analysis in section 36 of the Constitution.<sup>765</sup> However, the PAJA was left with only a rationality review and a *Wednesbury* type formulation prohibiting administrative action that is “so unreasonable that no reasonable person” could have taken it.<sup>766</sup> Section 6(2)(f)(ii) contains the rationality review:

“(2) A court or tribunal has the power to judicially review an administrative action if – ...

(f) the action itself – ...

(ii) is not rationally connected to –

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator; ...”

<sup>761</sup> *Bel Porto School Governing Body v Premier, Western Cape* 2002 (9) BCLR 891 (CC) para 127.

<sup>762</sup> Para 127.

<sup>763</sup> 2004 (7) BCLR 687 (CC). Quinot & Liebenberg (2011) *Stellenbosch Law Review* 644.

<sup>764</sup> Unreasonableness was a common-law ground of review only for delegated legislation. See *Currie Promotion of Administrative Justice Act* 169. *Kruse v Johnson* 1898 (2) QB 91.

<sup>765</sup> See *Currie Promotion of Administrative Justice Act* 171.

<sup>766</sup> See J De Ville *Judicial Review of Administrative Action in South Africa* (2003) 209, where he quotes the Joint Parliamentary Committee’s Chairperson as stating that the review ground proposed by the SALC would potentially permit courts “to go too far into the merits and make political decisions.”

This is simply a minimum standard that administrative action should easily meet. The rational connection test merely requires that there be some rational association between the action and the rationale. Section 6(2)(h) on the other hand, is extremely similar to the *Wednesbury* test, involving a very narrow standard of reasonableness review somewhat like the “gross unreasonableness” test of the common law. Section 6(2)(h) states:

“(h) [T]he exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; ...”

Currie & Klaaren argued however, that it could be interpreted as different to the *Wednesbury* standard (by not just focusing on the egregiousness of the action) and as going beyond rationality thereby providing for review of the substance of a decision.<sup>767</sup> They suggested that the provision should be interpreted purposively to give effect to the constitutional right to reasonable administrative action by permitting a test of “substantive proportionality”.<sup>768</sup> Craig explains this concept as:

“[A]t a general level proportionality involves some idea of balance between competing interests and objectives and that it embodies some sense of appropriate relationship between means and ends.”<sup>769</sup>

In the Constitutional Court case of *Bato Star*<sup>770</sup>, the Court rejected “gross unreasonableness” as an inappropriate interpretation of section 6(2)(h) under section 33(1) of the Constitution, and instead adopted a “contextual reasonableness” standard under PAJA.<sup>771</sup> The case was an application for leave to appeal against a judgment<sup>772</sup> of the Supreme Court of Appeal, concerning the allocation of fishing quotas by the Chief Director in the Department of Environmental Affairs and Tourism. The decision was

<sup>767</sup> Currie *Promotion of Administrative Justice Act* 172.

<sup>768</sup> Currie *Promotion of Administrative Justice Act* 173.

<sup>769</sup> Craig “Administrative Law” in (2003) 414, quoted in Currie *Promotion of Administrative Justice Act* 173.

<sup>770</sup> 2004 (7) BCLR 687 (CC) para 1.

<sup>771</sup> Quinot & Liebenberg (2011) *Stellenbosch Law Review* 644.

<sup>772</sup> *Minister of Environmental Affairs and Tourism and others v Phambili Fisheries (Pty) Ltd and another* [2003] 2 All SA 616 (SCA).

taken in terms of a delegated decision-making power under section 18 of the Marine Living Resources Act 18 of 1998. The applicant, Bato Star Fishing (Pty) Ltd, was dissatisfied with the allocation it had received in the 2001 allocation process for the 2002-2005 fishing seasons and sought to review the allocation decision. Bato Star was a medium-sized black empowerment fishing company wanting to increase its fishing rights. The case raised the question of the extent to which the decision of the Chief Director was susceptible to review under the new constitution, and critically in the context of attempts at transformation in the fishing industry. The Court stated: “the manner in which transformation is to be achieved is, to a significant extent, left to the discretion of the decision-maker”.<sup>773</sup> The Court then went on to discuss the question of whether the Chief Director’s decision was a decision within the terms of s 6(2)(h) of PAJA which provides that a decision must not be “so unreasonable that no reasonable person” could have reached it.<sup>774</sup> The Court framed the reasonableness review based on Lord Cooke’s approach in *Trader’s Ferry*.<sup>775</sup>

It is clear from this judgment then, that reasonableness review under the right to just administrative action and PAJA invokes a flexible standard, depending on the issues in each case. O’Regan J listed the factors that will be relevant to whether a decision is reasonable or not, such as “the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected.”<sup>776</sup> This means that “[a]lthough the review functions of the court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews” is retained.<sup>777</sup> Furthermore, it appears to bring in a “substantive proportionality” review by incorporating aspects of “reasonable

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<sup>773</sup> *Bato Star Fishing v Minister of Environmental Affairs and Tourism* 2004 (7) BCLR 687 (CC) para 35.

<sup>774</sup> Paras 42-60.

<sup>775</sup> *R v Chief Constable of Sussex, ex parte International Traders Ferry Ltd* 1999 (1) All ER 129 (HL) 157; *Bato Star Fishing v Minister of Environmental Affairs and Tourism* 2004 (7) BCLR 687 (CC) para 44.

<sup>776</sup> Para 45.

<sup>777</sup> Para 45.

equilibrium”.<sup>778</sup> Whether or not one agrees with the outcome of the case, the interpretation of “reasonableness review” by the Court points to a respectful balance between the power of the executive to decide on the route which the goal of socio-economic transformation should take, and the power of the court to review that decision where the decision will not reasonably result in the achievement of that goal.<sup>779</sup>

Accountability for decision-making by the public administration, in particular in relation to the delivery of public goods (socio-economic rights) is a critical aspect of a democratic developmental state. Whilst it is the purview of the executive to determine the shape and form of social and economic policies, if they are not delivered in a manner consistent with the purpose and intent of those policies, the courts should be empowered to examine and question such administrative decisions. The administration is, after all, responsible for the implementation of the policies that the state devises to reduce poverty and inequality. If they are not implemented in accordance with those policies, nor achieve the objectives of the policies and socio-economic rights are thus denied or negated, the courts should hold those administrators to a higher, substantive standard “reasonableness”. I deal with the comparison between reasonableness review in administrative justice review and socio-economic rights in chapter six.

### 5 5 3 3 Procedural fairness and participatory democracy

As outlined in chapter two, the founding values of our constitutional democracy are accountability, responsiveness and openness.<sup>780</sup> In a democratic developmental state, participatory democracy enables the voices of the poor and marginalised in our society to have a say in the decisions, policies and laws that affect their daily lives.<sup>781</sup> The

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<sup>778</sup> Para 49. Hoexter “Just Administrative Action” in *Bill of Rights Handbook* 643 argue that *Bato Star* goes some way to a proportionality enquiry but stops short of it. De Ville *Judicial Review of Administrative Action* 215, is of the opinion that a full-blown proportionality enquiry should only be conducted under a review for reasonableness where decisions impact on “fundamental rights” – and *Bato Star* did not fall into this category.

<sup>779</sup> *Bato Star Fishing v Minister of Environmental Affairs and Tourism* 2004 (7) BCLR 687 (CC) para 48.

<sup>780</sup> Section 1(d).

<sup>781</sup> *Doctors for Life International v The Speaker of the National Assembly* 2006 (12) BCLR 1399 (CC) para 115, where the Constitutional Court highlighted the importance and value of participation by marginalised groups in legislative processes in giving legitimacy to legislation and dignity to those who participate. See also the discussion of the eviction cases in chapters four and six.

Constitution expressly provides for public access to and participation in legislative processes,<sup>782</sup> as well as executive processes.<sup>783</sup> The Constitutional Court has in several cases underscored the centrality of participatory democracy to the achievement of constitutional goals and values,<sup>784</sup> the necessity of this participation for purposes of informed decision-making<sup>785</sup> and affirmed the duty of the State to take positive measures to ensure that the public has the effective capacity and opportunity to participate in decision-making processes.<sup>786</sup> The Constitutional Court has affirmed that the participation of the poor in the determination of their access to benefits and services serves the values of dignity and freedom as well as gives substance to the deliberative and participatory democracy envisaged in the Constitution.<sup>787</sup>

A number of socio-economic rights related cases have gone before the courts in relation to administrative justice and access to material benefits, which have asserted the importance of the participation of those affected by the decisions. These cases have affirmed the importance of administrative justice rights of affected persons in relation to the rights of access to housing,<sup>788</sup> water<sup>789</sup> and social security.<sup>790</sup>

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<sup>782</sup> Sections 57, 59, 70, 72, 74, 116, 118, 160.

<sup>783</sup> Section 195(1)(e). Sections 50 and 51 of the Local Government: Municipal Systems Act 32 of 2000 affirm the application of the constitutional principles governing public administration to the provision of municipal services.

<sup>784</sup> In *Masetlha v President of the Republic of South Africa* 2008 (1) BCLR 1 para 181. See also *Doctors for Life International v The Speaker of the National Assembly* 2006 (12) BCLR 1399 (CC) para 121; and *Poverty Alleviation Network v President of the Republic of South Africa* 2010 (6) BCLR 520 (CC) para 40.

<sup>785</sup> *Poverty Alleviation Network v President of the Republic of South Africa* 2010 (6) BCLR 520 (CC) para 33.

<sup>786</sup> *Doctors for Life International v The Speaker of the National Assembly* 2006 (12) BCLR 1399 (CC) paras 108, 112–117.

<sup>787</sup> *Doctors for Life International v The Speaker of the National Assembly* 2006 (12) BCLR 1399 (CC) paras 115, 234 and *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd* 2006 (8) BCLR 872 (CC) para 627 where Sachs J writes of the importance of dialogue and having a voice in public affairs, to the right to dignity:

“The right to speak and to be listened to is part of the right to be a citizen in the full sense of the word. In a constitutional democracy dialogue and the right to have a voice on public affairs is constitutive of dignity.”

<sup>788</sup> *Joseph v City of Johannesburg* 2010 (3) BCLR 212 (CC) 30; (right to procedural fairness when electricity supply disconnected by municipality); and *Nokotyana v Ekurhuleni Metropolitan Municipality* 2010 (4) BCLR 312 (CC) (right to sanitation).

<sup>789</sup> *Mazibuko v City of Johannesburg* 2010 (3) BCLR 239 (CC) (right to sufficient water and legality of pre-paid water meters).

<sup>790</sup> A number of successful court challenges were brought under administrative law by indigent individuals affected by the withdrawal of social security benefits amidst the ongoing systemic problems in the administration of social grants in the Eastern Cape: *Bushula v Permanent Secretary, Department of Welfare*,



Section 33(1) of the Constitution gives everyone the right to administrative action that is “procedurally fair”. The qualifier of “fairness” in this instance, is not a substantive one in the sense of rightness, but seeks to ensure that both sides are listened to and taken into account. The importance of procedural fairness as a substantive participatory element of administrative justice, is eloquently described by Hoexter:

“Procedural fairness . . . is concerned with giving people an opportunity to participate in the decisions that will affect them, and – crucially – a chance of influencing the outcome of those decisions. Such participation is a safeguard that not only signals respect for the dignity and worth of the participants, but is also likely to improve the quality and rationality of administrative decision-making and to enhance its legitimacy.”<sup>791</sup>

This definition points to an aspect of the substantive content of the requirement of procedural fairness, namely the acknowledgement of the dignity and empowerment of the individual through respect for their participation in decisions that affect them. In a democratic developmental state, the courts and the public administration play a crucial role in facilitating people’s participation in decisions that affect them. The institutions of the courts and the administration need to create the space for voices to be heard and dignity to be upheld. They must have the institutional capacity and legitimacy to do so and as they do so, capacity and legitimacy of those institutions will in turn be built. Furthermore, this spotlight on procedural fairness is beneficial to the interests of the poor and vulnerable. Jagwanth, in an analysis of the impact of litigation under the right to administrative justice on the poor argues, “in a democracy, administrative justice attempts to balance the need for social transformation with individual fairness”.<sup>792</sup>

The principle of procedural fairness consists of two main components: a fair hearing (*audi alteram partem*) by an impartial decision-maker (*nemo iudex in sua causa*). These

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*Eastern Cape* 2000 (2) SA 849 (E); *Mahambehla v Member of the Executive Council for Welfare, Eastern Cape Provincial Government* 2001 (9) BCLR 899 (SE); *Mbanga v Member of the Executive Council for Welfare* 2002 (1) SA 359 (SA); *Nomala v Permanent Secretary, Department of Welfare* 2001 (8) BCLR 844 (E); *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxusa*; *Rangani v Superintendent-General, Department of Health and Welfare, Northern Province* 1999 (4) SA 385 (T).

<sup>791</sup> Hoexter *Administrative Law* 326-7. (Footnote omitted.)

<sup>792</sup> Jagwanth “The Right to Administrative Justice” 4.

requirements are highly context sensitive and what fairness demands will be interpreted in the specific circumstances of each case.<sup>793</sup> The provisions of PAJA frame the requirements and the common law remains relevant to their interpretation. Section 3(2)(b) of PAJA details a set of minimum requirements that an administrator “must” extend to any person entitled to procedural fairness under section 3(1). These requirements include “adequate notice of the nature and purpose of the proposed administrative action” and “a reasonable opportunity to make representations”.<sup>794</sup> Section 3(4)(a) allows for departure from the minimum requirements of section 3(2)(b) by providing that “[i]f it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2)”, while section 3(4)(b) sets out the factors that an administrator must take into account in deciding whether a divergence is “reasonable and justifiable”.

In *Mazibuko v City of Johannesburg*<sup>795</sup> (“*Mazibuko*”), the Court firstly had to consider the applicants’ argument that the City’s decision to introduce pre-paid water meters in a poor community was a decision within the meaning of administrative action as defined in PAJA. Section 4(1) of PAJA stipulates that all administrative decisions that affect the public must be preceded by public participation. Moreover, the applicants pointed to section 4(2)(e) of the Municipal Systems Act 32 of 2000, which places a duty on the Council to consult the local community about the “level, quality, range and impact of municipal services” and the “available options” for the delivery of services. The applicants argued that because the City did not hold a public enquiry or a notice and comment procedure before implementing the decision to introduce pre-paid meters, it failed to comply with PAJA. The Court held that the decision properly construed was a policy decision taken by the municipality within its executive powers, which is expressly excluded in paragraphs (cc) and (dd) of the definition of “administrative action”

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<sup>793</sup> *Zondi v MEC for Traditional and Local Government Affairs* 2005 (4) BCLR 347 (CC) para 114. As Ngcobo J stated in *Zondi*, “[t]he overriding consideration will always be what does fairness demand in the circumstances of a particular case.” See also *Minister of Public Works v Kyalami Ridge Environmental Association (Mukhwevho Intervening)* 2001 (7) BCLR 652 (CC) para 101; and *President of the Republic of South Africa and Others v South African Rugby Football Union* 1999 (10) BCLR 1059 (CC) para 219.

<sup>794</sup> Section 3(2)(b)(i) and (ii) respectively.

<sup>795</sup> 2010 (3) BCLR 239 (CC) paras 127-134.

contained in section 1 of PAJA. In any event, the Court held that the consultation undertaken with the community on the implementation of the pre-paid metres in terms of the Municipal Systems Act was “thorough and comprehensive”.<sup>796</sup>

Various scholars have critiqued the Court’s interpretation of “administrative action” and the reasoning behind its decision in *Mazibuko*.<sup>797</sup> *Mazibuko* demonstrates the confluence of public administration, policy and legislative regulation and was unhelpful in its use of the term “executive” to describe the action taken by the municipality. The court in its reasoning did not distinguish between narrow and broad policy formulation, as was done in *SARFU* and *Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College (PE) (Section 21) Inc* (“Permanent Secretary”).<sup>798</sup> This dual nature of the executive, in an institutional and a functional sense, is essential to the application of administrative law and a heightened accountability over state decisions. In a sense, most state decisions or acts involve a degree of policy, therefore a distinction between policy in a wide and narrow sense still provides procedural accountability over aspects of executive action, as should have been the case in *Mazibuko*.

In *Joseph v City of Johannesburg*<sup>799</sup> (“*Joseph*”), the city had disconnected the electricity supply to an apartment building when the owner of the building failed to pay his account. It was common cause that the city had followed a fair procedure with respect to the owner, by sending him notices about the arrears and informing him of possible disconnection before taking the decision. However, the residents of the building had no contractual relationship with the city as the supply of electricity was in bulk to the building and not to the individual apartments. They paid the owner directly for their

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<sup>796</sup> Para 134.

<sup>797</sup> See for example Liebenberg *Socio-economic Rights* 466-480; Maree “Administrative authorities” in *Administrative Justice in SA* 30, 48; and G Quinot “Substantive Reasoning in Administrative-Law Adjudication” (2010) 3 CCR 111 – 139.

<sup>798</sup> See also *President of the RSA v SARFU* 2000 (1) SA 1 (CC); and *Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College (PE) (Section 21) Inc* 2001 (2) SA 1 (CC) para 18 where the court distinguished between policy formulation and policy and legislation implementation in determining whether the exercise of certain executive powers could constitute administrative action. O’Regan stated:

“However, policy may also be formulated in a narrower sense where a member of the executive is implementing legislation. The formulation of policy in the exercise of such powers may often constitute administrative action.”

<sup>799</sup> 2010 (3) BCLR 212 (CC).

electricity supply. The issue before the court then became whether the city's decision to disconnect the electricity impacted on any of the rights of the tenants thereby obligating the city to act in a procedurally fair manner with respect to the tenants before disconnecting their power supply, as required by section 3(1) of PAJA.

The Constitutional Court in *Joseph* extended the meaning of “rights” under section 3(1) of PAJA by holding that the term includes “legal entitlements that have their basis in the constitutional and statutory obligations of government”.<sup>800</sup> The court held that the tenants had no contractual rights with the city that were impacted upon, nor did it decide on whether any of the tenants' fundamental rights (housing or dignity) were infringed upon. Instead, the court found that the city had constitutional and legislative obligations to provide basic municipal services, including electricity, to everyone in its jurisdiction.<sup>801</sup> The tenants therefore had a correlative “public law right” to such services.<sup>802</sup> Since the city's decision to disconnect the power supply impacted adversely on their rights, section 4 of PAJA also applied to the decision with respect to the tenants. *Joseph* thus expanded the scope of application of procedural fairness and administrative action under PAJA beyond traditional categories of rights.

This extended application of administrative justice to “public law rights” as administrative action in *Joseph*, supports a broader administrative accountability vital to a democratic developmental state. Procedurally fair administrative procedures and participation in decision-making leads to just substantive outcomes and trust in the public administration, both vital to a functioning participatory democracy. In *Joseph* the Constitutional Court stressed the importance of participation within the branch of local government:

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<sup>800</sup> Para 43.

<sup>801</sup> Para 35.

<sup>802</sup> Para 40.

“Compliance by local government with its procedural fairness obligations is crucial therefore, not only for the protection of citizens’ rights, but also to facilitate trust in the public administration and in our participatory democracy.”<sup>803</sup>

Skweyiya J in *Joseph* located the content of procedural fairness in the basic values and principles governing a *responsive* and *accountable* public administration, in section 195(1) of the Constitution - he stated that the following principles were particularly relevant to procedural fairness:

- (d) Services must be provided impartially, fairly, equitably and without bias.
- (e) People’s needs must be responded to, and the public must be encouraged to participate in policy-making.
- (f) Public administration must be accountable.
- (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.”<sup>804</sup>

The court stressed that the right to administrative justice “is fundamental to the realisation of these constitutional values, and is at the heart of our transition to a constitutional democracy”.<sup>805</sup> It established that the scope of the right to just administrative action, under the Constitution and PAJA, should embrace the principles of good governance. Capacitated, efficient and autonomous state institutions are characteristic of a democratic developmental state seeking to effectively address people’s needs.

The court also recognised the legitimate concern of “administrative paralysis” raised by the respondents in *Joseph*.<sup>806</sup> The Court emphasised that administrative efficiency in the public administration is important to democracy, and courts should not impose unduly

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<sup>803</sup> Para 46.

<sup>804</sup> Para 44.

<sup>805</sup> Para 45.

<sup>806</sup> See also *Premier Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) BCLR 151 (CC) para 41.

burdensome administrative requirements on them. The Court stated however, “the issue of administrative efficiency informs the content of the duties imposed under administrative law rather than the scope of the application of administrative law.”<sup>807</sup> It went on to state that the practical considerations mentioned by the respondents should not determine the scope of administrative action, but rather “inform the content of procedural fairness.”<sup>808</sup> Efficiency and capacity considerations are indeed an important aspect of any contextual determination of the content of procedural fairness in a democratic developmental state. However, the Court in *Joseph* stated: “[i]t is plain that the reach of administrative law would be unjustifiably curtailed if it did not regulate administrative decisions which affect the enjoyment of rights, properly understood, at least for the purposes of procedural fairness.”<sup>809</sup>

## 5.6 Conclusion

In this chapter I have argued that the substantive adjudication of the right to administrative justice will enhance the responsiveness of the state to conditions of poverty and inequality in South Africa and move us closer to a democratic developmental state. The right to administrative justice advances an efficient and effective administration, accountability for decision-making and for participatory democracy to thrive.

I examined the evolving realm of administrative law in international law, in the context of a changing situation of global governance and the global economy. Administrative law is becoming a powerful force for accountability and participation in decision-making at an international level. I discussed the modern purpose of the growing body of international law and jurisprudence in the area of administrative law, as one of addressing the substantial socio-economic challenges the world faces through attempts to regulate the global economic order and ongoing infringement of rights by the public and private spheres.

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<sup>807</sup> *Joseph v City of Johannesburg* 2010 (3) BCLR 212 (CC) para 29.

<sup>808</sup> Para 29.

<sup>809</sup> *Joseph v City of Johannesburg* 2010 (3) BCLR 212 (CC) para 45.

The significant advancement of South African administrative law from a procedurally focused area of law towards a more substantive conception of review has been largely due to the administrative justice provisions in the draft and the final Constitution. I considered the scope and the substantive content of the requirements of “lawfulness”, “reasonableness” and “procedural fairness”, under the right to “just administrative action” in section 33(1), in furthering the aims of transformative constitutionalism in a democratic developmental state. I argued that, in a similar way to the international evolution of the concept of administrative justice from a procedural to a substantive one, in the South African context the shift in how administrative justice is both perceived and practiced, has been driven by the notion that administrative decision-making must also assist in addressing the socio-economic needs of people. I argued that the essential elements of section 33 are capable of bringing about “justice” not purely in a procedural or “means” sense, but also in an “ends” sense.

The courts post-democracy, have interpreted the notion of “legality” in relation to administrative decision-making, with sufficient breadth and flexibility in order to further socio-economic transformation under a constitutional dispensation. The conceptualisation of “reasonableness” as a standard of review in administrative law has also shifted significantly towards a more substantive conception of review. I then examined the implications of this evolving jurisprudence for cases involving review of administrative action where socio-economic rights are impacted (“overlap cases”). These cases demonstrate a role for the notion of “legality” to support the realisation of socio-economic rights and complementary standards of reasonableness review under the different constitutional provisions. The reasonableness standard of review under administrative justice includes a procedural as well as a substantive element, both of which are necessary to fulfil the ideals of a transformative constitution in a democratic developmental state.

Finally, I examined the “procedural fairness” requirement in the “overlap” cases, as a participatory element of administrative justice that is compatible with socio-economic



rights and critical to a participatory democracy. The Constitutional Court has repeatedly affirmed that deliberative and participatory democracy seeks to enhance and deepen representative democracy and the values of freedom and dignity, by expanding the opportunities for people's active participation in decision-making processes, including in relation to cases dealing with their access to public goods (socio-economic rights). It is about more than merely "participating in periodic elections and in the formal mechanisms created for allowing citizens input in the institutions of representative democracy",<sup>810</sup> but also going beyond to creating numerous fora for dialogue and mechanisms for participation. The aim is to promote greater participation in the public and private institutions that affect diverse aspects of people's lives. Those particularly disadvantaged groups, who are not easily able to participate in deliberative processes as peers or political equals, must be given real and "meaningful" opportunities for participation.<sup>811</sup>

In order for socio-economic transformation in a democratic developmental state to have a real impact on the lives of the poor and marginalised, meaningful participation in administrative decision-making is required. Opportunities for informed participation can lead to transparent, accountable dialogue and debate on key policy choices to address the impact of poverty and inequality. This resonates with a constitutional democracy, which requires decisions to be considered in the light of certain fundamental norms and values. The adjudication of human rights norms in the courts is therefore also a significant opportunity for deliberation on the interpretation of the substantive content of rights from the perspective of the adjudicators and experts as well as the perspective of those whose rights are affected, as required in a participatory democracy.

The purpose of the analysis in this chapter was to explore the participatory role and substantive content of administrative justice in addressing poverty and inequality, in a democratic developmental state. I argued for a substantive right to just administrative action to further transparency and accountability of public institutions, or those

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<sup>810</sup> Liebenberg *Socio-Economic Rights* 30.

<sup>811</sup> Liebenberg *Socio-Economic Rights* 32.

performing public roles, and to facilitate empowerment of poor and vulnerable people in the delivery of social and economic goods. Administrative justice has a critical role to play alongside socio-economic rights, as an integrated human rights approach to poverty, in a South African democratic developmental state. True transformation can only take place in a democratic developmental state, where participatory democracy is alive and well, and where the procedural and substantive safeguards of administrative justice, are also essential “means” and “ends” in themselves. The next chapter will examine the interaction and complementarity between socio-economic rights and administrative justice in a South African democratic developmental state.

## CHAPTER 6: Socio-economic rights and administrative justice - Reducing poverty in a democratic developmental state

### 6.1 Introduction

This final chapter aims to consolidate and strengthen the complementarity of socio-economic rights and the right to administrative justice to implement the Constitution's transformative mandate and thereby ensure better outcomes for the poor, in a democratic developmental South African state. The sections below examine the interrelatedness between certain elements of socio-economic rights and the right to just administrative action discussed in chapters four and five. I seek to enhance the discourse and jurisprudence of socio-economic and administrative justice rights as an integrated human rights approach to addressing poverty, in the context of a democratic developmental state. I focus on the cases in which both administrative justice rights and socio-economic rights have been discussed or alluded to by the courts and provide possible interactive, interpretative approaches to their scope of application, the nature of the obligations, reasonableness review and participatory remedies.<sup>812</sup> In some cases the rights work alongside one another and supportively enhance the jurisprudence and developmental outcomes and in other instances they intertwine substantively and jurisprudentially.

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<sup>812</sup> *Minister of Public Works v Kyalami Ridge Environmental Association (Mukhwevho Intervening)* 2001 (7) BCLR 652 (CC); *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC); *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (1) BCLR 78 (CC); *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA, Amici Curiae)* 2005 (8) BCLR 786 (CC); *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (5) BCLR 475 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 (9) BCLR 847 (CC); *Mazibuko v City of Johannesburg* 2010 (3) BCLR 239 (CC); *Joseph v City of Johannesburg* 2010 (3) BCLR 212 (CC); *Abahlali Basemjondolo Movement SA v Premier of the Province of Kwazulu-Natal* 2010 (2) BCLR 99 (CC); *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (3) BCLR 177 (CC); *Nokotyana v Ekurhuleni Metropolitan Municipality* 2010 (4) BCLR 312 (CC); *Governing Body of the Juma Musjid Primary School and Another v Ahmed Asruff Essay NO and Others* 2011 (8) BCLR 761 (CC). G Quinot & S Liebenberg "Narrowing the band: Reasonableness review in administrative justice and socio-economic rights jurisprudence in South Africa" (2011) 22 (3) *Stellenbosch Law Review* 639-663, 639, 641, 648-652. Quinot and Liebenberg refer to these cases as "overlap" cases.

I begin with an overview of the South African jurisprudence on the interdependence of rights, in particular in poverty-related Constitutional Court cases. This links to the international, multidimensional and integrated human rights approach to poverty discussed in chapter three. I then propose an adjudicatory role for the courts when dealing with socio-economic issues, and characteristics that it should embody as a judicial institution in a democratic developmental state. As outlined in chapters two, four and five, in order for a democratic developmental state to truly and strongly emerge in South Africa, we must cultivate the following aspects: participatory democracy; human capabilities; autonomous institutions; state capacity; and social and economic policies that systemically progress developmental outcomes. Macro-economic policy must be designed and driven through coordinated, but not corrupted or captured, public-private partnerships, however that element is outside the scope of this dissertation and will not be discussed here.<sup>813</sup> Finally, I apply this adjudicatory approach to a set of cases where socio-economic rights and administrative justice are complementary in addressing the ongoing challenge of poverty and inequality in South Africa.

## **6 2 South African jurisprudence: Interdependence of human rights**

In chapter three I described the multi-dimensional conception of poverty from a development economics perspective and related it to the international, integrated human rights approach to poverty. This integrated human rights approach considers the realisation of socio-economic rights and civil political rights as equally crucial to the alleviation of poverty. In this section I set out the South African jurisprudence on the interdependence of human rights in the context of addressing poverty, as a normative, interpretive background to the specific focus on the interaction between socio-economic

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<sup>813</sup> See numerous instances of state corruption and “capture” in national government departments and State-Owned Enterprises (‘SOE’) uncovered over the past few years by the public protector, academics, researchers and investigative journalists: [M Mutize & S Gossel](#) “Corrupt state owned enterprises lie at the heart of South Africa’s economic woes” *Mail & Guardian* (2017-06-20) <<https://mg.co.za/article/2017-06-20-corrupt-state-owned-enterprises-lie-at-the-heart-of-south-africas-economic-woes>> (accessed 22-09-2017); Scorpio & amaBhungane “How McKinsey and Trillian ripped R1.6bn from Eskom – and planned to take R7.8bn more” *Daily Maverick* (2017-09-14) <https://www.dailymaverick.co.za/article/2017-09-14-scorpio-amaBhungane-how-mckinsey-and-trillian-ripped-r1.6bn-from-eskom-and-planned-to-take-r7.8bn-more/#.WcuArUyB1Z3> (accessed 22-09-2017); H Bhorat, M Buthelezi, I Chikpkin, S Duma, L Mondli, C Peter, M Qobo, M Swilling & H Friedenstien *Betrayal of the Promise: How South Africa is being stolen* State Capacity Research Project (2017).

rights and the right to administrative justice in the rest of the chapter. This interdependence acknowledges the multi-dimensional nature of poverty, and lends itself to mitigating poverty in its varied manifestations in a democratic developmental state, from these different rights angles.<sup>814</sup>

## 6 2 1 Socio-economic rights and the rights to life, freedom, equality and dignity

The various rights protected in the South African Bill of Rights have been recognised by the Constitutional Court as interdependent and interrelated.<sup>815</sup> In *Government of the Republic of South Africa v Grootboom* (“*Grootboom*”), Yacoob J explains the relationship between civil and political rights and social and economic rights broadly, in the context of addressing poverty and inequality, as being “interrelated and mutually supporting”.<sup>816</sup> Liebenberg argues that a substantive interpretative approach to human rights which “surfaces the interrelated values and rights at stake in particular cases promotes the transformative ethos of the Constitution”.<sup>817</sup>

The inclusion of justiciable socio-economic rights in the South African Constitution means that the social and economic conditions experienced by the poor can be scrutinised and ameliorated via adjudication, alongside civil and political rights. For example, in the *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* (“*Khosa*”) cases involving the rights of non-citizens to access social grants, the Court found that a number of rights were at stake. The court emphasised the

<sup>814</sup> See S Liebenberg *Socio-Economic Rights* (2010) 51-54 and 142, and the discussion on comparative international law in cases where express, justiciable socio-economic rights provisions do not exist and positive socio-economic duties are thus derived from various other rights, for example the right to life by the Indian Supreme Court. On the other hand, in jurisdictions such as South Africa, where justiciable socio-economic rights are incorporated in the Constitution, interpretative inter-linkages between various rights remain important for purposes of enhancing the transformative potential of the Constitution and as an acknowledgement of the multifaceted experience and interconnected dimensions of poverty.

<sup>815</sup> See *S v Makwanyane* 1995 (6) BCLR 665 (CC) paras 58-67, 80, 84, 86, 90 and 94-5; *Mohamed v President of the Republic of South Africa (Society for the Abolition of the Death Penalty in South Africa Intervening)* 2001 (7) BCLR 685 (CC) para 54; *Government of the Republic of South Africa and Others v Grootboom* 2000 (11) BCLR 1169 (CC) paras 23 and 83; *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) BCLR 569 (CC) para 41; *Kaunda v President of the RSA* 2004 (10) BCLR 1009 (CC) para 274; *Union of Refugee Women v Private Security Industry Regulatory Authority* 2007 (4) BCLR 339 (CC) para 111; and *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) BCLR 158 (CC) paras 148-154.

<sup>816</sup> 2000 (11) BCLR 1169 (CC) para 23.

<sup>817</sup> Liebenberg *Socio-Economic Rights* 142.

interconnectedness of the rights in the Bill of Rights as a factor in ascertaining the reasonableness of a measure.<sup>818</sup> Apart from the socio-economic right to social assistance, the case was also said to have affected the rights to life, dignity, and equality.<sup>819</sup> The courts' interpretive approach in cases addressing circumstances of poverty, has taken cognisance of the interdependence between all rights in the Bill of Rights, in particular socio-economic rights and civil and political rights such as the right to life,<sup>820</sup> the right to freedom and security of the person,<sup>821</sup> the right to equality<sup>822</sup> and the right to dignity.<sup>823</sup>

## 6 2 2 Interdependence of participatory rights and socio-economic rights

In a democratic developmental state that acknowledges the deep entrenchment of disempowerment of the poor and marginalised, participatory rights are also intimately linked to socio-economic rights. As discussed in chapter three, effective participation in

<sup>818</sup> 2004 (6) BCLR 569 (CC) paras 40-44.

<sup>819</sup> Para 40; See also *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) paras 23 and 83.

<sup>820</sup> See Liebenberg *Socio-Economic Rights* 52, 142; and M Pieterse "A different shade of red: Socio-economic dimensions of the right to life in South Africa" (1999) 15 *SAJHR* 372-385. See *S v Makwanyane* 1995 (6) BCLR 665 (CC) paras 326-7; and *Soobramoney v Minister of Health (KwaZulu-Natal)* 1997 (12) BCLR 1696 (CC) para 31. The Indian Supreme Court has used the Directive Principles in Part IV of the Indian Constitution to inculcate substantive content in the right to life (art 21) of the Indian Constitution. The Court has thereby interpreted the right to life to include the basic necessities of life: *Francis Coralie Mullin v The Administrator* (1981) 2 SCR 516 (adequate nutrition, clothing, reading facilities); *Olga Tellis v Bombay Municipal Corporation* (1985) 3 SCC 545 (right to a livelihood); *Shanti Star Builders v Narayan K. Totame* (1990) 1 SCC 520; and *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan* (1997) 11 SCC 123 (right to shelter); *Paramanand Katara v Union of India* (1989) 4 SCC 286; and *Paschim Banga Khet Majoor Samity v State of West Bengal* (1996) 4 SCC 37 (right to health care); and *Unnikrishnan J P v State of Andhra Pradesh* (1993) 1 SCC 645 (right to education). See the discussion of the constitutional jurisprudence of the Indian Supreme Court pertaining to socio-economic rights in Liebenberg *Socio-Economic Rights* notes 217-239 and accompanying text 121-125.

<sup>821</sup> See generally S Liebenberg "The Value of Freedom in Interpreting Socio-Economic Rights" *Acta Juridica* 2008 1 149-170. See also *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (4) BCLR 301 (CC) para 82.

<sup>822</sup> The equality clause in the Bill of Rights section 9(2) states: "Equality includes the full and equal enjoyment of all rights and freedoms". See S Liebenberg & B Goldblatt "The Interrelationship between Equality and Socio-Economic Rights under South Africa's Transformative Constitution" (2007) 23 *SAJHR* 335-361; and C Albertyn "Substantive equality and transformation in South Africa" (2007) 23 *SAJHR* 253-276. See also *Minister of Finance v Van Heerden* 2004 (11) BCLR 1125 (CC). For a discussion of the interpretation of substantive equality rights in Canadian cases to protect equal access to welfare and other socio-economic benefits by disadvantaged groups, see Liebenberg *Socio-Economic Rights* 125-126 and footnotes.

<sup>823</sup> *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) paras 82-83; *Daniels v Scribante* 2017 (8) BCLR 949 (CC) for example paras 2, 3, 23 and 25. See S Liebenberg "The Value of Dignity in Interpreting Socio-Economic Rights" (2005) 21(1) *SAJHR* 1. See also discussion by Liebenberg *Socio-Economic Rights* 128-129 regarding the Colombian Court's granting of relief in cases where socio-economic rights' violation affects the enjoyment of civil and political rights such as the right to life, personal integrity or dignity and when particular groups do not enjoy the basic conditions for a dignified life.

social, economic and political life requires a person to at least have their basic material needs met, at the same time, the manner in which those needs are met should be determined through participatory mechanisms, as circular means and ends to overcoming poverty. Thus the rights of access to information (s 32) and administrative justice (s 33) have an equally important role to play in a South African democratic developmental state in giving poor people a platform to be heard and to participate in socio-economic decisions that affect their lives and rights.<sup>824</sup>

Scott distinguishes between “organic” and “related” interdependence of rights.<sup>825</sup> Socio-economic rights and participatory rights are not sub-sets of each other but rather “mutually reinforcing” but with distinct roles to play. The interdependence between these rights, as Scott points out, is based on the actual social experience of human beings living in poverty. Osmani on the other hand discusses the various ways in which human rights are relevant to poverty: constitutive relevance; instrumental relevance - causative or evaluative; and constraint-based relevance.<sup>826</sup> Socio-economic rights and participatory rights are both constitutive of and instrumental to reducing poverty. Participatory rights are instrumental, for example, as a means of evaluating the extent and success of poverty reduction measures through the participation of the poor. According to the *OHCHR Guidelines*, there are four stages of participation in poverty reduction policy formulation: preference assessment; policy choice; policy implementation; and monitoring, assessment

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<sup>824</sup> See Liebenberg *Socio-Economic Rights* 53, 126-127 and footnotes on the application of the principles of procedural fairness in American cases where the protection of social benefits was sought. See also cases on administrative justice and participation of the poor in decision-making in a number of successful court challenges that were brought under administrative law by indigent individuals affected by the withdrawal of social security benefits amidst the ongoing systemic problems in the administration of social grants in the Eastern Cape. See also cases involving administrative justice and housing and basic services: *Nokotyana v Ekurhuleni Metropolitan Municipality* 2010 (4) BCLR 312 (CC); *Joseph v City of Johannesburg* 2010 (3) BCLR 212 (CC) 30; and *Mazibuko v City of Johannesburg* 2010 (3) BCLR 239 (CC) 28.

<sup>825</sup> See chapter three. C Scott “The interdependence and permeability of human rights norms: Towards a partial fusion of the international covenants on human rights” *Osgoode Hall Law Journal* Vol 27(4) 1989 770-878, 794-798.

<sup>826</sup> See chapter three. S Osmani *S Evolving Views on Poverty: Concept, Assessment and Strategy* Poverty and Social Development Papers No.7 (2003) *Asian Development Bank* 21-22.



and accountability.<sup>827</sup> Participatory rights should facilitate involvement in all stages of policy formulation as well as implementation.

Despite the well-established international categorisation of civil-political and socio-economic rights,<sup>828</sup> there are not impermeable boundaries between the different rights in the South African Bill of Rights.<sup>829</sup> By applying a substantive interpretation of human rights norms, the interaction and interconnectedness of various rights in achieving social justice has been recognised by the South African Courts, including their common underlying values. The ongoing interpretation of rights, instead of confining rights, should endeavour to develop their content and scope in a way which enhances their interdependence and recognises the multi-dimensional, complex nature of the experience of poverty and inequality.<sup>830</sup>

In the next sections, I analyse the achievements, shortcomings and potential of the interwoven jurisprudence on socio-economic rights and administrative justice, to advance poverty reduction in a South African democratic developmental state. I firstly outline the separation of powers and political-legal context, which should inform the adjudicative approach the courts adopt in these cases in order to frame the interpretive analysis. I then identify key interdependent features of each set of rights, which could conceivably enhance the future integrated interpretation of socio-economic rights and administrative justice in cases confronting poverty reduction. I focus in particular on the rights to

<sup>827</sup> Office of the United Nations High Commissioner for Human Rights *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies* (2006) 14-15 <<http://www.ohchr.org/EN/Issues/Poverty/DimensionOfPoverty/Pages/Guidelines.aspx>> (accessed 10-05-2017).

<sup>828</sup> Scott (1989) *Osgoode Hall Law Journal* 27(4); C Scott "Reaching Beyond (Without Abandoning) the Category of Economic, Social and Cultural Rights" (1999) 21 *Human Rights Quarterly* 633-700; C Scott "Towards the Institutional Integration of the Core Human Rights Treaties" in Valerie Oosterveld and Isfahan Merali (eds) *Reaching Beyond Words: Giving Meaning to Economic, Social and Cultural Rights* (2001) 7-38.

<sup>829</sup> Liebenberg *Socio-Economic Rights* 53. As Liebenberg points out, some rights do not fit neatly into either category, but fall into both or neither. For example labour rights are recognised in both the International Covenant on Civil and Political Rights 1966 (art 22), and the International Covenant on Economic, Social and Cultural Rights 1966 (art 8). Property rights are not recognised in either, but in some regional treaties such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 (art 1, Protocol 1), the American Convention on Human Rights, 1969 (art 21), and the African Charter on Human and Peoples' Rights, 1981 (art 14). The right to administrative justice is not recognised in any of the international human rights covenants or regional conventions. The right has only been inferred from the European human rights jurisprudence, namely from the fair hearing provision (art 6(1)) in the European Convention and the "right to good administration" in the Charter of Fundamental Rights of the European Union 2000.

<sup>830</sup> Liebenberg *Socio-Economic Rights* 54.

education, social security, housing and related basic services, where the interconnectedness of socio-economic rights and administrative justice in the context of poverty has been most vivid.

### **6.3 Adjudicating socio-economic rights and administrative justice in a democratic developmental state**

In order to reframe the potential role of the courts and an interdependent socio-economic rights/administrative justice adjudication to effectively tackle poverty and inequality in South Africa, it is necessary to broadly restate the goals and characteristics of a democratic developmental state. This framework is largely based on Peter Evans' depiction of the 21<sup>st</sup> century developmental state<sup>831</sup> and Amartya Sen's conception of multi-dimensional poverty and development,<sup>832</sup> outlined in chapters two and three.

Firstly, democratic participation is the foundational aim of *democratic* developmental states. Along the lines of Sen, developmental policies are public policies that are able to provide people with the freedom to make decisions to pursue the most appropriate strategies to achieve their values and goals.<sup>833</sup> These choices especially refer to the style and quality of life that they would prefer to maintain, and the capacity to take full control of their lives. Therefore, Sen's notion of "enhancing human capabilities" is a central goal of the democratic developmental state, both as a means and an end to addressing poverty and inequality. Enhancement of human capabilities is then not just a welfare goal but also an important driver of sustained and inclusive, democratic development.<sup>834</sup> Jennifer Nedelsky's conceptualisation of autonomy reveals both the social and the individual nature of human beings<sup>835</sup> and is closely linked to Sen's theory of building capabilities. Participation is critical to both democracy and autonomy. The term "autonomy"

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<sup>831</sup> P Evans "Constructing the 21<sup>st</sup> century developmental state: potentialities and pitfalls" in O Edigheji (ed) *Constructing a democratic developmental state in South Africa* (2010).

<sup>832</sup> A Sen *Development as Freedom* (1999).

<sup>833</sup> Sen *Development as Freedom* 36-43.

<sup>834</sup> O Edigheji (ed) *Constructing a Democratic Developmental State in South Africa* (2010) 13. See also S Van Der Berg *A capabilities approach to the judicial review of resource allocation decisions impacting on socio-economic rights* LLD thesis University of Stellenbosch (2015).

<sup>835</sup> J Nedelsky "Reconceiving autonomy" (1989) *Yale Journal of Law and Feminism* 7-36.

encompasses the importance of social context in defining “who” we are as well as the capacity to choose one’s own life. The active ingredients that nurture “autonomy” can exist in social and intimate relationships and should be supported through formal structures of authority, such as the courts, the executive and the legislature. Sen developed the similar concept of “agency” to promote the idea that vulnerable individuals, groups and communities can and should be their own agents of change and not only passive recipients of resources.<sup>836</sup>

Secondly, the state capacities required for the enhancement of human capabilities and the realisation of socio-economic rights, are the effective and efficient provision of collective goods. The effective and efficient provision of public goods, including health, education, social welfare, housing, food and water, is necessary to provide a social safety net alongside macro-economic policy. The design, development and delivery of these public goods is dependent on government *administrative capacity* and institutions that are “*autonomous*” and anchored on “*active democratic structures*”.<sup>837</sup> This requires the public administration to be sufficiently skilled. The courts’ socio-economic rights and administrative justice adjudication assesses government action in delivering public goods for defects in access and outcomes for those in need. The public administration and the executive policy-makers must also be “autonomous” in the sense that they act on behalf of citizens and are not acting as a state captured by private interests.<sup>838</sup> At the same time, the legislative, executive and judicial arms must be “active democratic structures”. One ordinarily thinks of the legislature as democratic in terms of the participation of the

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<sup>836</sup> Sen *Development as Freedom* 11.

<sup>837</sup> Evans “Constructing the 21<sup>st</sup> century developmental state” in *Constructing a Democratic Developmental State in South Africa* 38.

<sup>838</sup> See Public Protector “State of Capture Report No.2 of 2016/17” (14-10-2016) *Public Protector South Africa* <[http://www.pprotect.org/library/investigation\\_report/2016-17/State\\_Capture\\_14October2016.pdf](http://www.pprotect.org/library/investigation_report/2016-17/State_Capture_14October2016.pdf)> (accessed 29-11-2016). See for example the social grants crisis and allegations of corruption by the Minister of Social Development and the South African Social Security Agency (SASSA) alluded to in: *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) BCLR 1 (CC); *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 (6) BCLR 641 (CC); *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2015 (6) BCLR 653 (CC); *Black Sash Trust v Minister of Social Development* 2017 (5) BCLR 543 (CC) and *Black Sash Trust v Minister of Social Development (Freedom Under Law NPC Intervening)* 2017 (9) BCLR 1089 (CC). Discussed further below.

elected representatives and the general public in law-making. Similarly the executive is constitutionally compelled to consult the public on policy-making.<sup>839</sup> Based on Sen's development theory, strategies and policies cannot be solely formulated by technocrats, but must be derived from democratically organised public deliberation. Deliberative and participatory democratic institutions are essential to a South African developmental state. Public policy for human development must be conceptualised and implemented through deliberative mechanisms that are broadly collaborative between all sectors of society: Evans refers to this as "synergistic state-society relations".<sup>840</sup>

The judiciary is a South African institution that is less "democratised", but is capable of designing and enforcing innovative participatory mechanisms and remedies, such as "meaningful engagement". The novel development of the court's jurisprudence around "meaningful engagement", attempts to include the voices of the poor in the decisions affecting them.<sup>841</sup> Young's experimentalist and managerial review, and "catalytic court" model, reflect such conceptions of the role of the judiciary in a transformative constitutional democracy.<sup>842</sup> The democratic experimentalist form of review described by Ray, and based on the public law litigation model of Charles Sabel and William Simon,<sup>843</sup> focuses on the role the courts can play in initiating and managing processes where the state, litigants and other stakeholders can develop substantive standards and novel, experimental remedies.<sup>844</sup> This more "democratised" formulation of the role of the judiciary acknowledges the important contribution of participatory democracy to the empowerment of the poor, over and above the amelioration of the material conditions of life. Both, it is argued, are means and ends for real and lasting socio-economic transformation in a South African democratic developmental state.

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<sup>839</sup> Section 195(1)(e).

<sup>840</sup> Evans "Constructing the 21<sup>st</sup> century developmental state" in *Constructing a democratic developmental state in South Africa* 38.

<sup>841</sup> See section 6.5 below.

<sup>842</sup> K Young "A typology of economic and social rights adjudication: Exploring the catalytic function of judicial review" *ICON* (2010) Vol 8 No 3 395-407.

<sup>843</sup> C Sabel & W Simon "Destabilization Rights: How Public Law Litigation Succeeds" (2004) 117 *Harv L Rev* 1016. See further discussion in 6.4.1 below.

<sup>844</sup> B Ray *Engaging with Social Rights: Procedure, Participation, and Democracy in South Africa's Second Wave* (2016) 219-224. See further discussion in 6.5.1 below.

Finally, disaggregated developmental outcomes are necessary to demonstrate socio-economic progress, at an individual, group and systemic level.<sup>845</sup> As sketched in chapter three, multi-dimensional poverty indicators have improved somewhat since the advent of democracy in South Africa. However many millions of people still live in conditions of poverty without adequate housing, quality education, basic services and suffering from ill-health, and social exclusion. This relates to the international obligations of “result” discussed above, as well as to those rights subject to progressive realisation.<sup>846</sup> Similar to the Sustainable Development Goals, developmental outcomes should indicate an improved proportional trajectory for poor individuals and groups, over time. An incremental, substantive interpretation and systemic implementation of socio-economic rights will aid this advancement, as well as ensure accountability for improvement in outcomes over time, in a democratic developmental state.

#### **6 4 Characteristics of adjudication in a democratic developmental state**

For a South African democratic developmental state to flourish, there is a need to profoundly reconceptualise the role of the judiciary within the separation of powers doctrine and strike a better balance between judicial “activism” and deference in socio-economic rights and administrative justice adjudication.<sup>847</sup> In chapter four, I suggested a reinvigorated model of judicial *prowess* and an experimentalist, substantive approach to socio-economic rights adjudication that would better serve the transformative project. In this section I expand on this judicial review model and approach – which I refer to as the “democratic incremental” approach – and then apply it to an interdependent adjudication

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<sup>845</sup> See Presidency *Development Indicators* (2014) 4 <<http://www.dpme.gov.za/publications/Reports%20and%20Other%20Information%20Products/Development%20Indicators%202014.pdf>> (accessed 16-06-2017).

<sup>846</sup> Sections 26(2), 27(2) and 29(1)(b).

<sup>847</sup> See generally Liebenberg *Socio-Economic Rights*; Ray *Engaging Social Rights*; Young (2010) *ICON* 385-420; D Brand “Judicial Deference and Democracy in Socio-Economic Rights Cases in South Africa” (2011) *Stellenbosch Law Review* 614; J De Ville *Judicial Review of Administrative Action in South Africa* (2003); H Corder (1998) “Administrative justice: A cornerstone of South Africa's democracy” (1998) 14 *SAJHR* 38; D Dyzenhaus “The Politics of Deference: Judicial Review and Democracy” in M Taggart (ed) *The Province of Administrative Law* (1997); C Hoexter “The Future of Judicial Review in South African Administrative Law” (2000) 117 *SALJ* 484; K O'Regan “Breaking Ground: Some thoughts on the seismic shift in our administrative law” (2004) 121 *SALJ* 424; H Corder “Towards Administrative Justice” in *Empowerment and Accountability* (1991); E Mureinik “Reconsidering review: Participation and accountability” (1993) *Acta Juridica* 35.

of socio-economic and administrative justice rights, to further a democratic developmental state.

Democratisation of the courts; increased accountability of the executive and the administration for effective policy design and delivery of public goods; and substantive interpretation of socio-economic and administrative justice rights to individually and systemically address the multi-dimensional challenges of poverty, are all necessary building blocks of the South African democratic developmental state. I discuss next how democratic experimentalist, substantive incremental, managerial and autonomous approaches to the interdependent adjudication of socio-economic rights and administrative justice, relate to these elements of a South African democratic developmental state.

#### 6.4.1 Democratic experimentalism

“Democratic experimentalism” is a model for operationalising participatory democracy through institutional mechanisms that make public authorities more responsive to the needs of people via effective service delivery. The “democratic experimentalist review”, described by Charles Sabel and William Simon, serves to democratise judicial review and minimise the tension with judicial competence by creating opportunities for legislative, executive and non-governmental responses to judicial cases dealing with socio-economic rights.<sup>848</sup> Experimentalist review depends on a participatory and iterative remedial process in which parties and various stakeholders identify solutions to the violations found by the court. This form of review “combines more flexible and provisional norms with procedures for ongoing stakeholder participation and measured accountability”.<sup>849</sup> The court does not specify remedial measures but instead manages a process whereby the parties themselves resolve the issues in the case.

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<sup>848</sup> Sabel & Simon (2004) *Harv L Rev* 1016; Ray *Engaging Social Rights* 27-28; M Tushnet “Social welfare rights and the forms of judicial review” 82 *Texas Law Review* (2004) 1895.

<sup>849</sup> Sabel & Simon (2004) *Harv L Rev* 1019.

An experimentalist review approach recognises a strong right, but does not itself delineate the substance of the right, rather it determines a process for experimenting with substantive norms to fulfil the legal rights obligation. The court in this way cedes control to the participants to determine the specific measures and to jointly adjust them over time as results appear. However, it does provide a strong remedy in that remedies in these cases will usually involve a structural interdict. A participatory remedial process necessarily makes judicial enforcement more democratic too. Experimentalism democratises judicial review through the provision of opportunities for private parties and other interested stakeholders to participate in crafting human rights norms by specifying remedies for constitutional violations.

Experimentalism also particularly targets the executive by creating a mechanism to democratise executive decision-making processes through judicial enforcement. Sabel and Simon describe the experimental remedial process in public-law litigation as a mechanism for opening up bureaucratic administrations to democratic participation in policy development and implementation. They characterise this as “destabilisation rights”, which force public institutions to engage with stakeholders and citizens directly and constructively and to take heed of their views.<sup>850</sup> This way participation can lead to the empowerment of people, as well as amelioration of conditions of poverty.

However, as Liebenberg and Young argue, in practice weak-form remedies can serve to further marginalise poor people and tax their already depleted resources.<sup>851</sup> I agree with their view, and therefore argue that substantive judicial interpretation must guide procedural obligations placed on the executive to determine concrete benefits together with affected communities and their representatives. Landau also rejects this weak-form review and its idealised judicial-political engagement because “the intended recipient of the dialogue is unlikely to respond effectively”.<sup>852</sup> The state often lacks the capacity – in

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<sup>850</sup> Sabel & Simon (2004) *Harv L Rev* 1055-1056.

<sup>851</sup> S Liebenberg and K G Young “Adjudicating Social and Economic Rights: Can Democratic Experimentalism Help?” in H A Garcia, K Klare and L A Williams (eds) *Social and Economic Rights in Theory and Practice: Critical Inquiries* (2015) Chapter 13.

<sup>852</sup> D Landau “The Reality of Social Rights Enforcement” 53 *Harv L Rev* (2012) 192.



terms of skills – as well as the resources and willingness to fulfil such dialogic obligations.<sup>853</sup> Conditions and mechanisms that make court enforcement more democratic, must work alongside those that meet basic needs and make progressive realisation possible. Sabel and Simon argue that there is insufficient evidence of the superiority of the experimentalist model in achieving results above other alternatives, but they conclude that experimentalist approaches have “functional jurisprudential properties” that are manifestly favourable to the uncertainty and complexity that surrounds public policy issues.<sup>854</sup>

Both democratic experimentalism and Young’s “catalytic court” model identify adjudicative approaches that allow courts to maintain a strong judicial role and also mitigate the democratic-legitimacy and institutional competence concerns of commentators on the justiciability of socio-economic rights. The discernible pattern of tension in the second wave of socio-economic rights cases demonstrates the court’s strong aversion to developing the substantive content of socio-economic rights, whilst firmly exercising strong procedural authority. In a democratic developmental state, the Court should combine a strong substantive interpretative role with an active democratic remedial role.

#### 6 4 2 Substantive incrementalism and systemic transformation

Despite the remarkable number of eviction cases that the Court has adjudicated, there is a dearth of substantively rich discussion on what section 26 fully entails and whether particular policies or legislation comply with it. The Constitutional Court has demonstrated a reluctance to interpret housing legislation and policies in accordance with an elaborated set of constitutional principles. Between the first and second wave of socio-economic rights that came before the courts, the interpretive approach lacked substantive content. Liebenberg has suggested a stronger interpretive role, but more

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<sup>853</sup> See for example *Black Sash Trust v Minister of Social Development* 2017 (5) BCLR 543 (CC) and *Black Sash Trust v Minister of Social Development (Freedom Under Law NPC Intervening)* 2017 (9) BCLR 1089 (CC).

<sup>854</sup> C Sabel & W Simon “Minimalism and Experimentalism in the Administrative State” (2011) *Geo L Rev* 53, 78.

flexible and contextually based. Other commentators have pushed for a minimum core interpretation of socio-economic rights, which the court outright rejected in *Mazibuko v City of Johannesburg* (“*Mazibuko*”).<sup>855</sup>

I suggest a substantive incremental approach to socio-economic rights that begins with a delineation of the minimum level required of a right and then expands upon that over time, based on the cases that are brought before the court. In addition, the minimum level should be substantively interpreted via participation of various stakeholders and the litigants, as described in the experimentalist mode. The incremental approach also promotes systemic reform because principles can be applied at scale over time, for example the requirement that Cities plan and budget for emergency accommodation for people that might be evicted from public or private land, under section 26. Over time, this right should be expanded to include more long-term, permanent solutions beyond the minimal temporary accommodation, emergency requirement. They could also eventually cover principles of spatial justice and integration and the requirement that social housing projects be attached to larger housing developments in well-located urban areas, for example. Constitutional norms thus develop incrementally, in phases and through engagements between the courts, litigants, technical experts, the legislature and the executive. The key features of this model are: a judicial role that emphasises democratic processes *and* incremental substantive interpretation of socio-economic rights through engagement amongst courts, political branches and civil society. This model is elaborated further below.

The Court is required to proactively interpret constitution-enforcing legislation and policy, for example PIE in *Port Elizabeth Municipality v Various Occupiers*<sup>856</sup> (“*PE Municipality*”) and HIV treatment policy in *Minister of Health v Treatment Action Campaign (No 2)*<sup>857</sup> (“*TAC*”). In *City of Johannesburg Metropolitan Municipality v Blue*

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<sup>855</sup> 2010 (3) BCLR 239 (CC) para 39. D Bilchitz “Giving socio-economic rights teeth; the minimum core and its importance” (2002) SALJ 484.

<sup>856</sup> 2004 (12) BCLR 1268 (CC).

<sup>857</sup> 2002 (10) BCLR 1033 (CC).

*Moonlight Properties 39 (Pty) Ltd*<sup>858</sup> (“Blue Moonlight”) and *Occupiers of Erven 87 and 88 Berea v De Wet*<sup>859</sup> (“Occupiers Berea”), the court relied primarily on an interpretation of the Housing Act and found that “the City has a duty to plan and budget proactively for situations like that of the Occupiers”.<sup>860</sup> The Court in *Occupiers Berea* stated that it was the duty of the court, as part of the just and equitable enquiry, “to be proactive in gathering information about all the relevant circumstances, considering that information and arriving at a just and equitable order in the circumstances of each case.”<sup>861</sup> The judgments imply that all levels of government are required to be proactive in fulfilling their obligations, and the courts must be proactive in holding the state accountable. This can happen at the inquiry and the remedial stages.

In the unqualified education rights cases, the courts have adopted a more substantive incremental approach.<sup>862</sup> Courts have outlined the broader values underlying the right and asserted the immediate realisation principle. The cases have thus far positively shaped the content of the right to education as well as broader systemic, transformational impacts. These include: the improvement of state institutional capacities; the provisioning of required inputs for education such as textbooks, learner transport and infrastructure; the creation of partnerships in the implementation process; the recognition of participatory democratic processes for determining school policies; and the advancement of public processes to determine solutions to address underlying structural issues.<sup>863</sup> These judgments are the building blocks in the development of a substantive incremental jurisprudence and provide the impetus for further systemic reform.

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<sup>858</sup> 2012 (2) BCLR 150 (CC).

<sup>859</sup> 2017 (5) SA 346 (CC).

<sup>860</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) BCLR 150 (CC) para 67.

<sup>861</sup> *Occupiers of Erven 87 and 88 Berea v De Wet* (CCT108/16) [2017] ZACC 18 (8 June 2017) para 55.

<sup>862</sup> See for example: *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (3) BCLR 177 (CC); *Minister of Basic Education v Basic Education for All* 2016 (4) SA 63 (SCA).

<sup>863</sup> See Open Society Foundation *Strategic Litigation Impacts: Equal Access to Quality Education* (2017) 57-73. The OSF report uses the following typology in assessing impact: (1) material outcomes; (2) policy changes or jurisprudential shifts; and (3) agenda change as a result of litigation. See also F Veriava *The Limpopo Textbook Crisis 2012* <<http://www.section27.org.za/wp-content/uploads/2013/10/The-2012-Limpopo-Textbook-Crisis1.pdf>> (accessed 09-10-2017); F Veriava *The contribution of the courts and of civil society to the development of a transformative constitutionalist narrative for the right to basic education* LLD thesis University of Pretoria (2017).

### 6 4 3 Managerialism

A managerial role for the courts was described in *PE Municipality*,<sup>864</sup> and then reflected in both *Olivia Road*<sup>865</sup> and *Joe Slovo*.<sup>866</sup> Ray argues that the Court's decision to ignore more substantive issues in these, and other eviction cases, and rather focus on procedural control over the effects rather than the substance of housing policies, represents a preference for managerial judging over a substantive approach.<sup>867</sup> In *Blue Moonlight*,<sup>868</sup> the court employed a robust version of this managerial approach, by temporarily preventing the eviction of occupiers from private land and then requiring the City of Johannesburg to adapt its housing policy to include provision for private evictions.

I do not propose a purely “managerial” proceduralised model devoid of substance, as applied in *Olivia Road*<sup>869</sup> and *Maphango v Aengus Lifestyle Properties (Pty) Ltd*<sup>870</sup> (“*Maphango*”), but see the value of the managerial approach to ensure that state institutions fulfil their obligations based on the court's decision. The Court's use of procedural techniques and flexible balancing tests is the hallmark of the “managerial” approach.<sup>871</sup> The court should develop the substantive side of the managerial approach, by incorporating an interpretation of what the right entails and thereby considering what it is trying to achieve. In *Juma Musjid*,<sup>872</sup> the court had to balance the substance of the right to education and the right to property, through the innovative use of meaningful engagement. The court's use of meaningful engagement in this and other cases generates a framework for applying the managerial role to the policy and decision-making context. This is discussed in more detail below.

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<sup>864</sup> 2004 (12) BCLR 1268 (CC).

<sup>865</sup> 2008 (5) BCLR 475 (CC).

<sup>866</sup> *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 (9) BCLR 847 (CC). Ray *Engaging Social Rights* 89, 128.

<sup>867</sup> Ray *Engaging Social Rights* 110.

<sup>868</sup> 2012 (2) BCLR 150 (CC).

<sup>869</sup> 2008 (5) BCLR 475 (CC).

<sup>870</sup> 2012 (5) BCLR 449 (CC).

<sup>871</sup> See sections 4 3 and 4 4 above. Young (2010) *ICON* 402-407.

<sup>872</sup> *Governing Body of the Juma Musjid Primary School and Another v Ahmed Asruff Essay NO and Others* 2011 (8) BCLR 761 (CC).

More recently, in the social security *AllPay*<sup>873</sup> cases and the case of *Black Sash Trust and Another v Minister of Social Development and Another* '(Black Sash Trust')<sup>874</sup>, the Constitutional Court boldly formulated remedies that have both experimentalist and managerial features. In the *AllPay* cases the Court retained a supervisory role over the matter, until November 2015, when SASSA filed a report to the Court stating that it would not award a new contract but intended to take over the payment function of social grants from 1 April 2017, which was the date when the suspension of invalidity ended. On that basis, the Court discharged its supervisory role. However, just prior to 1 April 2017, it became apparent that SASSA would not be able to pay the grants. A public interest organisation, the Black Sash therefore instituted an application on behalf of all grant beneficiaries requesting that the Court reinstitute its oversight role to ensure that SASSA complies with its constitutional obligations to pay the social grants

The Court declared that SASSA and CPS are under a constitutional obligation to ensure payment of social grants to grant beneficiaries from 1 April 2017 until an entity other than CPS is able to do so and that a failure to do so would infringe upon the rights of grant beneficiaries of access to social assistance under section 27(1)(c) of the Constitution. The initial declaration of invalidity of the contract was also further suspended for a 12-month period from 1 April 2017. The Court thus issued a structural order requiring the Minister of Social Development and SASSA to make periodic reports on progress towards the payment of social grants. The Court provided for the establishment of a committee made up of lawyers and technical experts to evaluate and make regular reports on the distribution of the grants. Finally, the Court's order also made provision for the involvement of the Auditor-General to monitor the implementation of the interim contract.

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<sup>873</sup> *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) BCLR 1 (CC); *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 (6) BCLR 641 (CC); *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2015 (6) BCLR 653 (CC).

<sup>874</sup> 2017 (3) SA 335 (CC).

#### 6 4 4 Autonomous institutions

Scholars of the developmental state, discussed in chapter two, have highlighted its *organisational* features, namely the capacity to formulate and implement a developmental agenda and *structural* characteristics, namely the autonomy of state institutions. These attributes enable the developmental state to define and promote its strategic developmental goals, in an “embedded” sense where the state and society are bound to work together in a way that “provides institutionalised channels for the continual negotiation and renegotiation of goals and policies”<sup>875</sup>, but not to purely profit themselves. According to Evans, institutional-societal “embedded” autonomy requires coherent state agencies not only to formulate, but also to implement coherent developmental goals, such as those articulated in the National Development Plan 2030 (‘NDP’).<sup>876</sup>

Mkandawire defines the developmental state as one where the main theoretical underpinning is “developmentalist”, where the state must ensure socio-economic progress. The institutional capacity required is dependent on technical, administrative and political factors, in order for the state to implement policies effectively. This state form must be wisely and sturdily autonomous in devising long-term socio-economic policies, uncaptured by private sector interests. Finally, this state must remain transparent and accountable in order for it to gain and maintain the support of key social actors and not allow illegitimate state capture.<sup>877</sup>

It is necessary to recognise that these rights exist in a broader context of public policy, macroeconomics and politics.<sup>878</sup> The rise to prominence of the Public Protector in South Africa, since Thuli Madonsela took up office, was largely due to her fearless holding of

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<sup>875</sup> Evans P *Embedded Autonomy: States and Industrial Transformation* (1995) 12.

<sup>876</sup> National Planning Commission *NDP Executive Summary* (2012) <<http://www.gov.za/issues/national-development-plan-2030>> (accessed 29-06-2017).

<sup>877</sup> T Mkandawire “Thinking about developmental states in Africa” *Cambridge Journal of Economics* 25 (2001) 289-313, 290.

<sup>878</sup> R Hirschl & E Rosevear “Constitutional Law meets Comparative Politics: Socio-economic Rights and Political Realities” in T Campbell, K D Ewing, & A Tomkins *The Legal Protection of Human Rights: Sceptical Essays* (2011) 207-228, 220-221.

public institutions and figures such as the State President Jacob Zuma, to account. In the Constitutional Court case to determine whether or not the decisions of the Public Protector were binding, *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly*<sup>879</sup> (“EFF”), the Court held that the remedial action taken by the Public Protector against President Jacob Gedleyihlekisa Zuma in terms of section 182(1)(c) of the Constitution was binding.<sup>880</sup> Although the conduct of the President does not constitute “administrative action” for purposes of this dissertation, the principles of democratic accountability as stated by Mogoeng CJ apply to all public actors.<sup>881</sup>

“One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of State power and resources that was virtually institutionalised during the apartheid era. To achieve this goal, we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy. For this reason, public office-bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck.”

What is required in a South African democratic developmental state, where there are enduring challenges of poverty and inequality and swelling corruption, is a collaborative and substantive approach to finding systemic solutions, effectively implementing them and holding the state to account. This fits well with Young’s notion of a catalytic court, as opposed to a supremacist court.<sup>882</sup> I refer to it as “democratic incrementalist” adjudicative approach, which lends itself to furthering a democratic developmental state. The courts have been exemplary in holding steadfastly to the Constitution and being a bastion of independent, autonomous institutions.

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<sup>879</sup> 2016 (5) BCLR 618 (CC).

<sup>880</sup> There are currently a number of cases against the State President, brought by a variety of civil society organisations and political parties, challenging for example, the President’s appointment of the Chief of Prosecutions, the recent Cabinet reshuffle in March 2017 (largely seen as linked to putting in place acolytes who will assist in allocating government tenders to a host of interconnected, corrupt private companies), and so on. See Biznews “#Zupta vs South Africa” <http://www.biznews.com/leadership/2016/11/21/zupta-south-africa-6-legal-battles/> (accessed on 27-06-2017).

<sup>881</sup> Para 1.

<sup>882</sup> Young (2010) *ICON* 418-420.



## 6 5 Democratic incrementalism

In a South African democratic developmental state, collaboration amongst all stakeholders is critical to transforming the enduring poverty and inequality. The judiciary can be inspired to display an increasingly proactive, democratic and participatory approach, without usurping the functions of the other arms of government or going beyond its technical capacity. This approach, which I refer to as judicial prowess, as opposed to judicial deference, permits the Court to use its skills at different levels of review ranging in depth of substance, range of engagement and selection of remedy as appropriate to the context of each particular case.<sup>883</sup> The democratic experimentalist and managerial styles of review have the most potential to enhance and strengthen this approach of the courts in the socio-economic rights/administrative justice jurisprudence.<sup>884</sup>

Judicial prowess means that the courts possess the boldness, skill, tenacity and flexibility to determine the most suitable judicial approach in each given case. This must be underpinned by a robust substantive interpretation of socio-economic rights and administrative justice and an active-democratic, experimentalist methodology. These two roles can be in tension. A “democratic incrementalist” review model allows different perspectives to be brought to bear on socio-economic problems and their solutions, within a particular factual situation as well as beyond, to similar situations.

Such jointly crafted solutions may have broader policy and resource implications, but will only touch on social policy aspects and not on matters of macro-economic policy. Socio-economic rights adjudication should facilitate the determination of the minimum and incremental content of the multiplicity of public goods such as health, water, education, housing, required to support the populace who are poor and in need. But it should not

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<sup>883</sup> See for example *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC); *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (5) BCLR 475 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 (9) BCLR 847 (CC). See also *Joseph v City of Johannesburg* 2010 (3) BCLR 212 (CC) para 64.

<sup>884</sup> See sections 4 3 and 4 4 above. Young (2010) *ICON* 402-407; and K Young “The Avoidance of Substance in Constitutional Rights” *V* (2014) *CCR* 233.

enter the territory of macro-economic policy, for example, trade or industrial policy. Determination of economic policy most likely to produce higher rates of investment, growth and sustainable, inclusive development would be beyond the technical policy know-how of judges, lawyers, and litigants. Macro-economic policy, as opposed to social policy, is then largely left only to the executive branch of government to determine, with support from technical experts.

Furthermore, participatory rights are important in the four stages of poverty reduction policy formulation described in chapter three: “preference revelation; policy choice; implementation; and monitoring, assessment and accountability”.<sup>885</sup> Before policies are formulated, people must be able to express their preferences and the objectives they want to achieve. Policy choice is when policies are formulated and resources allocated. These two stages occur in the domain of the executive arm of government, with support from the administration. The implementation of policies is also primarily the responsibility of the executive arm of the State, and the public administration is responsible for creating opportunities to enable the poor to exercise their right to participate. At the final stage of participation, monitoring and evaluation of the impact of policies is the way in which the State and other duty-bearers can be held accountable for their obligations. This assessment stage can also be conducted with the participation of affected communities. The courts’ key role in a democratic developmental state, is to interrogate and enforce meaningful participation of the poor in policy and decision-making processes and rights interpretation, as well as holding the State and other duty-bearers accountable.

#### 6 5 1 Democratic incrementalism: An adjudicatory approach

In Chapter four I identified a relative dearth of substance in the courts’ approach to interpreting socio-economic rights. A possible evolving approach could incorporate democratic experimentalist and substantive incremental elements in the development of the content of a socio-economic right. The first part of the test would entail a determination of the broad purposes and underlying values of the right in question. For

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<sup>885</sup> OHCHR *Guidelines* 14-15.

example, the Constitutional Court in *Juma Musjid*<sup>886</sup> highlighted the broad purposes of the right to education. The second part would identify the needs of poor and vulnerable people, in the particular circumstances of the case, based on the perspective of those directly affected. The third part would identify the different interventions required to meet these needs, again based on the evidence accumulated via a participatory inquiry. The Court may order and oversee this inquiry or it could delegate the inquiry to another institution or tribunal, as appropriate. Such an evidence-based inquiry relies on the effective participation of the affected parties, technical experts, lawyers, amicus, public officials and other relevant stakeholders. The inquiry should be determined on a case-by-case basis depending on the context in which a particular deprivation occurs.

At the remedial stage, the Court would employ an experimentalist approach to guide and supervise the process of negotiation to develop a context-based remedy. The court would issue structural supervisory orders and establish a committee or task team or another kind of participatory process such as public hearings or court appointed commissions, to determine a remedy, establish guidelines for the process of implementation and monitor the implementation of the remedy. There are numerous examples in the South African jurisprudence where participatory processes such as committees or task teams including government, civil society and experts have cooperatively developed solutions for rights violations.<sup>887</sup> On the other hand, a stark example where the participatory, structural remedy was unsuccessful in protecting socio-economic rights were the *AllPay* cases in the much-publicised social security saga.<sup>888</sup> Thus, at the remedial stage, and during the negotiation that occurs between the different stakeholders, the government should provide details of concrete measures, processes and time-frames that will be adopted, any

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<sup>886</sup> 2011 (8) BCLR 761 (CC) para 41.

<sup>887</sup> *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Another* ('Western Cape Forum for Intellectual Disability') 2011 (5) SA 87 (WCC).

<sup>888</sup> *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) BCLR 1 (CC); *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* (No 2) 2014 (6) BCLR 641 (CC); *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2015 (6) BCLR 653 (CC); *Black Sash Trust v Minister of Social Development* 2017 (5) BCLR 543 (CC) and *Black Sash Trust v Minister of Social Development (Freedom Under Law NPC Intervening)* 2017 (9) BCLR 1089 (CC).

potential constraints, for example budgetary and administrative capacity constraints, and how they will deal with such constraints.

Experimentalist remedies can address the institutional concerns regarding the substantive approach to socio-economic rights adjudication, by including government as part of the process of seeking solutions. Government is then more likely to comply with the court order. This participative approach will also ideally find better and more grounded solutions for broader systemic change, through engagement with different stakeholders in the four stages of poverty reduction policy formulation described above.

I have therefore proposed a conception of judicial review where the courts play a more robust role in developing the substantive contours of rights *and* encouraging participation in socio-economic decision-making. The integrated rights-based approach to poverty described above, supports the interaction between socio-economic rights and administrative justice to incrementally achieve developmental outcomes. There is evidence of considerable potential in the jurisprudence, as well as a democratic necessity, especially in the current context of growing corruption. But there is also a tension that plays out in the courts' understanding and application of the doctrine of separation of powers and their concomitant judicial role conception.<sup>889</sup> A democratic developmental state can guide the elucidation of a new understanding of the separation of powers and judicial role conception, within the current South African socio-political context.<sup>890</sup>

In the next section I make recommendations to guide the South African Constitutional Court's socio-economic rights and administrative justice adjudication, within the ambitious framework and goals of a democratic developmental state. The transformative role of the courts in a democratic developmental state necessitates recognition that the empowerment of the poor includes actual material and psycho-socio-political elements, as illustrated by the multi-dimensional human rights approach to poverty. The judiciary can "democratise" itself by facilitating the substantive interpretation of socio-economic

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<sup>889</sup> Young (2010) *ICON* 418-420.

<sup>890</sup> See Ray *Engaging with Social Rights* 8; R Hirschl "From Comparative Constitutional Law to Comparative Constitutional Studies" 11 *International Journal of Constitutional Law* 1 (2013).

rights and administrative justice and ensuring direct relief to the poor, through the participation of poor litigants, legal and technical experts, in the tradition of deliberative and participatory democracy, and democratic experimentalism. In this way the adjudication of socio-economic rights can truly achieve the over-arching goals to reduce poverty and inequality, of a democratic developmental state.

## **6 6 How can socio-economic rights and administrative justice contribute to the realisation of a democratic developmental state in SA?**

I now turn to the interpretative and remedial tools that the South African judiciary may utilise to support an interdependent adjudication of socio-economic rights and administrative justice, in meeting the aims of a democratic developmental state.

### **6 6 1 Enhancing democratic accountability and participation**

The scope of socio-economic rights applies to the actions or inactions of the executive, the legislature as well as private actors.<sup>891</sup> As discussed in chapter four, according to the Constitutional Court and its interpretation of the separation of powers doctrine, a considerable margin of discretion must be given to the state in deciding how to go about fulfilling socio-economic rights. A court, circumscribed by certain boundaries, can evaluate the “reasonableness” of the measures that the state adopts.<sup>892</sup> Moreover, given that both legislative and other measures must be taken, reasonableness can be evaluated in relation to the conceptualisation of the legislative programme as well as its implementation. The former is the domain of the legislature and the latter the domain of the executive and the administration. As stated in *Grootboom*:

“Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act *to achieve the intended result*, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. These policies and programmes must be reasonable both in their conception and implementation. The

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<sup>891</sup> Section 8 of the Constitution.

<sup>892</sup> See chapter four.

formulation of a programme is only the first stage in meeting the state's obligations. The programme must also be reasonably *implemented*. An otherwise reasonable programme that is not *implemented* reasonably will not constitute compliance with the state's obligations."<sup>893</sup>

In the three early socio-economic rights cases of *Grootboom*<sup>894</sup>, *TAC*<sup>895</sup> and *Khosa*<sup>896</sup>, the Constitutional Court focused on the reasonableness of the legislative and other measures in relation to the inclusivity of their conceptualisation, as opposed to the reasonableness of their implementation via executive action. In *Mazibuko*<sup>897</sup> the court dismissed the arguments of the Phiri residents that the free basic water supply of 6 kilolitres per household per month (or 25 litres per person per day) was insufficient to meet their basic needs, and held that the policy was reasonable, despite substantial evidence and argument to the contrary from technical experts and the community themselves. This case focused on the reasonableness of the policy measures for implementing the right to water, and the Court gave a particularly narrow reading of its own application of the reasonableness standard in the cases of *Grootboom*<sup>898</sup> and *TAC*.<sup>899</sup>

The second wave cases have come before the courts over disputes regarding the particular implementation choices of the executive's programmes to realise socio-economic rights, in particular in relation to housing, basic services, social security and education rights.<sup>900</sup> The Constitutional Court's requirement that programmes must also be reasonable in their implementation of the socio-economic right leads one to conclude that if, for example,

<sup>893</sup> *Government of the RSA v Grootboom* 2000 (11) BCLR 1169 (CC) para 42 [emphasis added].

<sup>894</sup> The *Grootboom* case turned on the State's lack of legislative and policy measures designed to provide temporary emergency shelter for people in a situation of homelessness.

<sup>895</sup> The *Minister of Health v Treatment Action Campaign* 2002 (10) BCLR 1033 (CC) case turned on the fact that the government's policy on the prevention of mother-to-child transmission of HIV (PMTCT) was not comprehensive.

<sup>896</sup> *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) BCLR 569 (CC) para 49. In *Khosa* the Constitutional Court concluded that conferring benefits of the social security system on citizens only was not reasonable because it violated the equality rights of permanent residents by excluding them from the scheme. The Court placed emphasis on the interconnectedness of the rights in the Bill of Rights and the importance of ascertaining the reasonableness of a measure by virtue of its impact on other rights, in particular the rights to life, dignity and equality.

<sup>897</sup> 2010 (3) BCLR 239 (CC).

<sup>898</sup> 2000 (11) BCLR 1169 (CC).

<sup>899</sup> 2002 (10) BCLR 1033 (CC).

<sup>900</sup> See chapter 4.

the benefits of the government's social assistance programme do not reach the people who are eligible for such assistance, the programme may not pass constitutional muster and barriers to accessibility must be reduced.<sup>901</sup> Although it is up to the legislature and the executive to decide on "the precise contours and content of the measures to be adopted", they must still ensure that the measures adopted are reasonable in that they in fact deliver to those in need ("achieve the intended result").<sup>902</sup>

The majority of socio-economic rights cases that have come before the Constitutional Court have been on the right to housing, in particular in relation to evictions of poor communities from public and private land, and then also in relation to housing-related rights, namely the provision of electricity, water and sanitation. These cases have established the significance of participatory rights for poor people when government wishes to implement housing-related policy and law. The Court has been at pains to ensure via its orders that poor people are able to participate in the state's decisions affecting the provision of services to them. In evictions cases such as *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg*<sup>903</sup> ("Olivia Road") and *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*<sup>904</sup> ("Joe Slovo"), the Constitutional Court required a process of mediated engagement between the parties, in order to bring about the "reasonable" implementation of housing and basic services. The process of "meaningful engagement" on the measures to be adopted to realise socio-economic rights in these cases, goes to the heart of the "reasonableness" of such measures, in relation to their implementation. In other cases, participatory processes have played a role in the conceptualisation of social policies, for example in

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<sup>901</sup> See the latest cases on the delivery of social grants: *Black Sash Trust v Minister of Social Development* 2017 (5) BCLR 543 (CC) and *Black Sash Trust v Minister of Social Development (Freedom Under Law NPC Intervening)* 2017 (9) BCLR 1089 (CC). For a discussion of the social security cases brought under administrative law by indigent individuals in the Eastern Cape see S Jagwanth *The Right to Administrative Justice: The Impact of Litigation on the Poor* unpublished paper presented at the Foundation for Human Rights Conference *Celebrating a Decade of Democracy: A focus on the last ten years of South Africa's Democracy and the advancement of rights* (Durban, 22-25 January 2004) (copy on file with author); N de Villiers "Social Grants and the Promotion of Administrative Justice Act" (2002) 18 SAJHR 320; C Plaskett "Standing, Welfare Rights and Administrative Justice" (2000) 11 SALJ 647.

<sup>902</sup> *Government of the RSA v Grootboom* 2000 (11) BCLR 1169 (CC) paras 41, 42.

<sup>903</sup> 2008 (5) BCLR 475 (CC).

<sup>904</sup> 2009 (9) BCLR 847 (CC).



*Doctors for Life International v The Speaker of the National Assembly*<sup>905</sup> (“*Doctors for Life*”) and *Mazibuko*.<sup>906</sup>

The scope of the right to administrative justice, as discussed in chapter five, is focused on the administrative action on the part of the public administration, in other words the exercise of public power by all organs of state (or private actors) excluding the legislature, the judiciary and the arena of policy-making, oftentimes in the delivery of socio-economic rights. The exercise of such power is mediated by the requirements of lawfulness, reasonableness and procedural fairness, in relation to both the process and outcomes of the administrative action in question. There is a complementary overlap in scope here with respect to the reasonableness of the implementation measures to realise socio-economic rights. Such implementation - as opposed to the conceptualisation of policies by the executive - and the responsibility for ensuring participation in relation to that implementation, falls squarely within the jurisdiction of the public administration.

In the case of *Olivia Road*, the court dealt simultaneously with procedural fairness under PAJA and meaningful engagement as a matter of reasonableness under section 26. The judgement of the Constitutional Court firstly dealt with the reasons for its engagement order and the purpose and nature of such engagement. It affirmed the principle that serious engagement should take place in good faith between public officials and people facing potential homelessness due to an eviction, for the purposes of finding a humane and pragmatic solution. However the court chose not to decide on the arguments raised by the occupiers that the issuing of the section 12(4)(b) notices by the City constituted administrative action and was therefore subject to the hearing or public inquiry procedures in terms of section 3, alternatively section 4 of PAJA. It is unfortunate that the court chose not to take up the opportunity to clarify the applicability of public inquiry and other procedures provided for in section 4 of PAJA, in the circumstances of an eviction, which is a result of an administrative action that adversely affects rights.

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<sup>905</sup> 2006 (12) BCLR 1399 (CC).

<sup>906</sup> 2010 (3) BCLR 239 (CC).

The requirements under the right to just administrative action can serve to enhance the interpretation of the “reasonableness” of implementation measures when socio-economic rights must be realised for people living in poverty. Their participation is necessary in order to ensure the best possible outcome, and is a necessary, empowering element of the democratic developmental state. The institutions of government, namely the courts, the administration, the legislature, the executive, organs of state as well as private actors exercising public power, need to become more active, democratic and accountable, structures.<sup>907</sup> They need to be capable of hearing the voices of poor and vulnerable people and thereby enable socio-economic transformation. It would be unreasonable to do otherwise.

The distinctiveness and the interconnectedness between the scope of application of socio-economic rights and administrative justice (“related interdependence”) are tangible, for example, when we explore the right of access to water. The right may be denied in terms not only of access to the socio-economic right in section 27(1)(b) but also in terms of the right to just administrative action when local government organs, for varying reasons, are unable to implement these services. The distinction would be the disconnection of existing water services as compared to the failure to provide access to water at all – negative and positive obligations in relation to the *implementation* of socio-economic rights by the administration. This also provides a comparison between the right of access to water and the right to just administrative action when decisions relating to cut-offs are made.<sup>908</sup>

In a democratic developmental state, the capacity of the state to effectively and efficiently deliver socio-economic rights, such as the right to water, *and* to enable the meaningful

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<sup>907</sup> Evans “Constructing the 21<sup>st</sup> century developmental state” in *Constructing a democratic developmental state in SA* 38. See discussion in chapter two.

<sup>908</sup> See M Kidd “Not a Drop to Drink: Disconnection of Water Services for Non-payment and the Right of Access to Water” (2004) 20 *SAJHR* 119-37. See for example *Residents of Bon Vista Mansions v Southern Metropolitan Council* 2002 (6) BCLR 625 (W) where the applicants, residents of an apartment block in Hillbrow, were granted urgent interim relief after the municipal water supply to their building was discontinued by the respondent. Budlender AJ based his decision on the right of everyone to have access to “sufficient food and water” in s 27 of the Constitution. See also *Joseph v City of Johannesburg* 2010 (3) BCLR 212 (CC) 30; and *Mazibuko v City of Johannesburg* 2010 (3) BCLR 239 (CC) in relation to electricity cut-offs without prior notice to the tenants.

participation of affected people in both the conceptualisation and implementation of such rights, is critical. Poverty can then be addressed by both material alleviation and political empowerment. This speaks to the multi-dimensional nature of poverty and the integrated human rights approach to poverty. The state and the courts have a vital role to play in facilitating participation of the poor in a democratic developmental state, and ensuring accountability for the actual delivery of rights.

The courts can support a democratic developmental state by adopting a more robust and participatory adjudicative approach. The approach requires the courts to engage substantively with the content of rights, as well as to proactively engage relevant state role-players, litigants and technical experts in participatory processes to assist the court to delineate the content and monitor implementation. Similar to the methods the court has applied in a number of cases, the court can request state parties (and private parties) to provide reports on engagement with affected communities, and the court can also join other relevant parties to provide evidence of engagement.<sup>909</sup> These engagement reports inform the courts of the various views on the content of rights and potentially help to produce a consensus view on the principles, values, norms, intended results and minimum requirements of rights. The courts can then enforce these in their judgements and orders and ensure the implementation of orders is monitored by appropriate bodies, either through supervisory orders or by Chapter 9 institutions such as the South African Human Rights Commission ('SAHRC').

## 6 6 2 Individual rights and developmental outcomes

The main distinction drawn by international law between socio-economic rights and civil and political rights is the different nature of state's obligations with regard to their implementation. It is firstly alleged that socio-economic rights are mainly positive rights

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<sup>909</sup> See for example approaches in: *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 (9) BCLR 847 (CC); *Joseph v City of Johannesburg* 2010 (3) BCLR 212 (CC) 30; *Mazibuko v City of Johannesburg* 2010 (3) BCLR 239 (CC); *Governing Body of the Juma Musjid Primary School v Ahmed Asruff* 2011 (8) BCLR 761; *Black Sash Trust v Minister of Social Development* 2017 (5) BCLR 543 (CC) and *Black Sash Trust v Minister of Social Development (Freedom Under Law NPC Intervening)* 2017 (9) BCLR 1089 (CC); *Occupiers of Erven 87 and 88 Berea v De Wet* (CCT108/16) [2017] ZACC 18 (8 June 2017).

that do not just require the state's abstention from violating the rights of its citizens, as would be the case with most civil and political rights. This supposition is based on the assumption that positive measures for the implementation of socio-economic rights always require resources whereas civil and political rights are for free because the state has only to abstain from certain behaviours. Even though this contention might be true in several instances, it has been shown that both civil and political rights and socio-economic rights include negative as well as positive obligations and require resources for their implementation. For example, criminal justices rights, as civil and political rights, contain the positive duty of the state to provide a police force and correctional services, while the right to housing includes the negative duty to refrain from arbitrary evictions.<sup>910</sup>

The categorisation of the right to administrative justice in international law is unclear, but I consider it to fall in to a civil and political rights categorisation for the purposes of this dissertation.<sup>911</sup> At first glance, administrative justice appears to deal largely with decisions that deprive someone of rights – similar to the conception of the negative protection of rights discussed above. At the same time those decisions which determine what that person's rights will be, as well as the failure to take an administrative decision,<sup>912</sup> are also defined as “administrative action” under PAJA. The “promotion” element of the state's obligations under section 7(2) of the Constitution also embodies positive elements that are potentially important to administrative law decision-making and imply that administrators must actively promote socio-economic rights realisation in their decision-making.<sup>913</sup> An interpretation of the right to administrative justice via a

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<sup>910</sup> I Rautenbach "The limitation of rights and 'reasonableness' in the right to just administrative action and the rights to access to adequate housing, health services and social security" (2005) 4 *TSAR* 627, 644-645.

<sup>911</sup> See chapter five.

<sup>912</sup> In a number of cases concerning grants, the courts declared the right of litigants to relief where there was a failure to take decisions in applications for social grants. See for example *Mahambehala v Member of the Executive Council for Welfare, Eastern Cape Provincial Government* 2001 (9) BCLR 899 (SE); *Mbanga v Member of the Executive Council for Welfare* 2002 (1) SA 359 (SA); *Vumazonke and others v Member of the Executive Council for Social Development, Eastern Cape Province* SECLD 25 November 2004 (Case Nos. 110/04, 826/04, 143/04, 2541/03) unreported.

<sup>913</sup> See *Minister of Home Affairs v Watchenuka* 2004 (1) SA 21 (SCA), an instance where the right to administrative justice, socio-economic rights and the right to dignity intersected to protect the rights of asylum-seekers, in certain instances, to employment and study. By using the right to administrative justice, the court directed the administration to exercise its powers in such a way that access would be decided upon based on the applicants' particular circumstances of need.

“substantive proportionality” test in cases where socio-economic rights are concerned would then enable this.<sup>914</sup>

In chapters four and five, I sought to delineate the obligations under the right to administrative justice as compared to the obligations under the socio-economic rights, in order to provide a better understanding of their function and impact in cases involving the amelioration of conditions for the poor and vulnerable sectors of society, in a democratic developmental state. The right to just administrative action could be used to place stronger positive obligations on the state to make decisions on the distribution of public goods in cases where a person’s socio-economic rights are affected. The qualifications of “within available resources” and “progressive realisation” would not apply in such cases, as they would under socio-economic rights. For example, when applicants for social grants are denied a grant either because a social security official did not make a decision or refused to award the grant on the basis of lack of particular required documentation, the right to just administrative action should place emphasis on the imperative end, to provide social assistance to people in need.

If the courts use a proportionality version of review for reasonableness where administrative decisions impact on fundamental socio-economic rights, it would provide a wider avenue for individual redress for those whose basic needs have not been met, than under socio-economic rights.<sup>915</sup> Therefore, in certain cases the negative and positive obligations under socio-economic rights and administrative justice can be mutually supportive. In other cases, the “substantive proportionality” test as applied to a positive obligation under administrative justice, can be a powerful tool in individual cases where socio-economic rights are affected. The drawback is that these cases may not advance systemic socio-economic transformation through policies, programmes and legislation, as required in a democratic *developmental* state.

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<sup>914</sup> See chapter five.

<sup>915</sup> See *De Ville Judicial Review of Administrative Action in South Africa* 124. In both instances, the section 33 right would still be subject to the limitations clause in section 36.

In a democratic developmental state, the capacity of the state to deliver socio-economic goods, such as the right to water, is critical. It is critical because it is the means by which poverty will be reduced at an individual level and in a more structural sense, at scale. Based on the description in chapters four and five and the analysis in this chapter, I argue that socio-economic rights and administrative justice can work interactively, alongside one another, to facilitate the state's delivery of material needs to individuals as well as to alleviate poverty systemically. Policies and laws that address the various dimensions of poverty must be developed to reduce poverty over time and for developmental outcomes to be achieved. That is the role and function of the executive and legislature, as well as the judiciary, as I argued in chapter four. The courts' incremental substantive adjudicative approach should hold the executive and the legislature accountable when they have failed to develop poverty reduction policies and laws, or when those policies and laws do not achieve the desired developmental outcomes. Affected communities and non-governmental organisations as litigants, provide the courts with the opportunity and obligation to then assist the other branches of government to address the gaps and failures, in a collaborative manner, by drawing out more substantive principles from individual cases to support others in similar situations.

The administration also has an equally powerful systemic role to play in addressing poverty in a democratic developmental state, by ensuring that it is efficient, that it has capacity to implement decision-making and delivery of services to people in such a way that it enhances their developmental outcomes, participation and empowerment. This is also the broader ambit of administrative justice that is about more than simply judicial review, but a host of other mechanisms to realise administrative justice in a capable and democratic, developmental state. Training of public officials in the administration, the establishment of administrative tribunals (such as a Social Security Tribunal) and the publication of administrative guidelines, are examples of mechanisms to support administrative justice achieve intended socio-economic impact, outside of the courts.

### 6 6 3 “Reasonableness review” and substantive interpretation of rights

The inter-linkages between the concept of “reasonableness” in socio-economic rights and administrative justice jurisprudence<sup>916</sup> must be examined in the context of the tenets of the doctrine of separation of powers. The requirement of “reasonable” administrative action, as compared to the requirement of “reasonable” measures under socio-economic rights obligations, and their respective relationship to “reasonableness” in the general limitations clause section 36 needs to be understood and harmonised for purposes of this dissertation.<sup>917</sup> The concomitant question of the appropriate level of judicial scrutiny of administrative decision-making in relation to poverty alleviation and the deference granted to the legislature and executive in determining the measures appropriate to the realisation of obligations under the socio-economic rights provisions, in the context of a democratic developmental state, are closely related.

Justice O’Regan identifies different levels of scrutiny for reasonableness review, and describes a “more intensive scrutiny” under socio-economic rights. As described in chapters four and five, rationality review has been applied in cases such as *Pharmaceutical Manufacturers Association of South Africa: In Re Ex Parte President of the Republic of South Africa*<sup>918</sup> (“*Pharmaceutical Manufacturers*”), *Prinsloo v Van der Linde*<sup>919</sup> (“*Prinsloo*”) and *Jooste v Score Supermarket Trading*<sup>920</sup> (“*Jooste*”) and a range of other cases; whilst the more intensive scrutiny of reasonableness has been applied in the socio-economic rights cases such as *Grootboom* and *TAC*. O’Regan explains that the levels of scrutiny appropriate to the different types of jurisdiction, should be determined with due regard to the following factors: “expertise of the tribunal, polycentric decisions, the need for an efficient administration, the constitutional commitment to responsiveness, transparency and accountability”.<sup>921</sup>

<sup>916</sup> Quinot & Liebenberg (2011) *Stellenbosch Law Review* 639-663.

<sup>917</sup> K Iles "Limiting socio-economic rights: Beyond the internal limitations clause" (2004) 20 *SAJHR* 448-65.

<sup>918</sup> 2000 (3) BCLR 241 (CC).

<sup>919</sup> 1997 (6) BCLR 759 (CC).

<sup>920</sup> 1999 (2) BCLR 139 (CC).

<sup>921</sup> O'Regan (2004) 121 *SALJ* 436-437.



A number of articles have addressed this issue squarely.<sup>922</sup> Wesson appraises the evolving socio-economic rights jurisprudence of the South African Constitutional Court and counters previous depictions of the Court's approach as constituting an administrative law approach to the adjudication of socio-economic rights.<sup>923</sup> He is of the opinion that under administrative law applying a stricter test than *Wednesbury*, the Court in *Grootboom* would have found that the state's conceptualisation of its obligation under section 26(1) and (2) constituted an entirely reasonable interpretation of those provisions.<sup>924</sup> He suggests that *Grootboom*, *TAC* and *Khosa* should rather be read as ensuring that vulnerable sectors of society are not ignored. *Grootboom*, he further argues, establishes "a relationship of collaboration between the state and the judiciary, in terms of which each branch of government brings its particular skills to bear on the problem of remedying such omissions".<sup>925</sup>

As described in chapter four, the Court's approach has focused on "structural good governance standards" in its reasonableness test, instead of delving into the *substance* of socio-economic rights and the concrete basic needs they seek to address.<sup>926</sup> Brand and others have argued that the Court has adopted this weak-form review approach because of its concerns about its role in relation to the political branches of government as well as "a formalist understanding of law".<sup>927</sup> But of more concern to the democratic developmental enterprise, is that the transformative agenda of the Constitution is

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<sup>922</sup> See Quinot & Liebenberg (2011) *Stellenbosch Law Review*; Rautenbach (2005) 4 *TSAR* 627; M Wesson "Grootboom and beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court" (2004) 20 *SAJHR* 284-307; D Brand "The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or 'What are Socio-Economic Rights For?'" in Botha H, Van der Walt A & Van der Walt J (eds) *Rights and Democracy in a Transformative Constitution* (2003) 33. See also O'Regan (2004) 121 *SALJ* 437 where she highlights this as a difficult question that requires investigation in relation to administrative law "in the context of an overall constitutional framework of values".

<sup>923</sup> Wesson (2004) 20 *SAJHR* 289.

<sup>924</sup> Wesson (2004) 20 *SAJHR* 292.

<sup>925</sup> Wesson (2004) 20 *SAJHR* 284.

<sup>926</sup> Brand "What are socio-economic rights for?" in *Rights and Democracy* (2004) 33.

<sup>927</sup> Brand "What are socio-economic rights for?" in *Rights and Democracy* (2004) 51. Ray *Engaging with Social Rights*.

significantly undermined, philosophically, politically and practically, due to the Court's proceduralisation of its adjudication of socio-economic rights.<sup>928</sup>

Indeed, the Constitutional Court's approach to socio-economic rights thus far mimics in many ways an administrative law review approach. The focus on procedural rather than substantive fairness in administrative law is intended to give effect to the principle of separation of powers. By generally limiting their deliberations to the *procedure* by which the decision was reached and not usually considering the substance of the decision, courts in administrative law proceedings are able to retain the distinction between appeal and review. The Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*<sup>929</sup> ("*Bato Star Fishing*") however established a more balanced approach in which reasonableness review in administrative law sometimes has substantive implications, and is not merely a procedural enquiry. The content of the reasonableness standard consists of a circumstance-based enquiry considering various factors, including: "the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected".<sup>930</sup> Reasonableness review is thus a contextual inquiry, involving both the normative context and the factual context. The normative context refers to the other constitutional provisions relevant to the case. At the same time, *Bato Star* reaffirmed the importance of the distinction between appeals and review and the care that the court should take "not to usurp the functions of administrative agencies".<sup>931</sup>

These renditions of judicial adjudication of socio-economic rights and administrative justice lead us to believe that the courts will not decide on matters of social and economic policy but have limited themselves to determining whether the correct procedures and principles of good governance have been followed in making the decision, or in designing

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<sup>928</sup> See also D Bilchitz "Giving socio-economic rights teeth; the minimum core and its importance" (2002) *SALJ* 484; T Roux "Understanding Grootboom - A response to Cass R. Sunstein" (2002) 12 *Constitutional Forum* 112-22.

<sup>929</sup> 2004 (7) BCLR 687 (CC).

<sup>930</sup> Para 45.

<sup>931</sup> Para 45.

and implementing the measures. However, the picture is not all bleak and has the potential to evolve substantially. The courts, albeit tentatively and superficially, have turned to the substance of socio-economic rights when probing the reasonableness of legislative and other measures designed to give effect to socio-economic rights.<sup>932</sup> Despite the paucity of satisfactory descriptions of the substantive content of socio-economic rights in its jurisprudence, the courts have considered the substantive content indirectly by identifying those who do not have access to a particular good or service - in other words who do not have their basic needs met - and recognising that “those whose needs are most urgent” or “those in desperate need and living in intolerable conditions”<sup>933</sup> must not be excluded from government programmes. The substantive interpretation of rights as well as the identification of people who are most vulnerable and in need of the fulfilment of those rights, fits with the intent of a democratic developmental state in its efforts to provide a social safety net and address long-term, structural poverty.

Quinot and Liebenberg propose a “unified model of reasonableness review” for cases where administrative and non-administrative measures have an impact on socio-economic rights.<sup>934</sup> They suggest that the various reasonableness standards found in different provisions of the Bill of Rights can be interpreted in a coherent way. In terms of their proposed model, reasonableness review under the different provisions overlap, but don’t perform the same function. The standards interact in a way that is able to support the essential advantages of a reasonableness model of review and a more substantive conception of review. They are of the view that the constitutional jurisprudence on socio-economic rights has insufficiently elaborated a “substantive account of the normative purposes and values promoted by these rights”.<sup>935</sup> However they argue that it remains possible for such an account to be developed under a single model of reasonableness review across socio-economic rights and administrative justice cases. This requires the development of reasonableness standards for forms of public action, based on proper

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<sup>932</sup> The courts have rejected the concept of “minimum core obligations” but see chapter four for examples of recent cases where the substance of socio-economic rights is discussed.

<sup>933</sup> *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) paras 43-44, 68.

<sup>934</sup> Quinot & Liebenberg (2011) *Stellenbosch Law Review* 653.

<sup>935</sup> Quinot & Liebenberg (2011) *Stellenbosch Law Review* 653.

consideration of the factual and normative context.

Their model is based on the *Bato Star* assessment of reasonableness, where the court will engage with the substance of the administrative decision at stake, however not in order to assess the correctness of the decision taken on the merits, but whether or not that decision “falls within a band of reasonable decisions”,<sup>936</sup> based on the merits. In cases where non-administrative action impacts on socio-economic rights, namely executive or legislative measures, the model of review applied will depend on whether the case is a breach of a negative duty imposed by the relevant, qualified socio-economic right, or a breach of a positive duty.<sup>937</sup> Where there has been a breach of a negative duty, the court would apply the strict proportionality analysis under the general limitations clause analysis in section 36. However, where a positive duty has been breached, the reasonableness analysis takes place within the relevant right, namely the internal reasonableness test of sections 26(2) or 27(2).<sup>938</sup>

I submit a complementary proposal to this outlining how the judiciary, as a “pro-active democratic” institution in a democratic developmental state, can implement such a reasonableness review model. As proposed in the substantive, democratic incrementalist adjudicatory approach above, the judiciary in such cases can assist to delineate the values and conceptual content of the socio-economic goods with reference to international law and the South African context. Together with people affected by the issues and a broader range of technocrats and experts, the courts can facilitate the crafting of the exact delineation of what must be delivered and how it must be delivered. The courts can activate this at the review stage by requesting reports and recommendations from the various parties to the litigation and by joining other relevant parties to the proceedings. At the remedial stage, this would be accommodated through the process of meaningful engagement and participatory, structural interdicts.

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<sup>936</sup> Quinot & Liebenberg (2011) *Stellenbosch Law Review* 653.

<sup>937</sup> Quinot & Liebenberg (2011) *Stellenbosch Law Review* 653.

<sup>938</sup> See A Pillay “Reviewing Reasonableness: An Appropriate Standard for Evaluating State Action and Inaction?” (2005) 122 *SALJ* 419 420; D Davis “To defer and when? Administrative Law and Constitutional Democracy” (2006) *Acta Juridica* 33; Young (2010) 8 *CON* 385.

## 6 6 4 Participatory remedies and their enforcement

Under the Constitution, the Courts have wide powers to make orders that are appropriate, just and equitable in order to provide effective relief when rights are infringed or threatened.<sup>939</sup> This includes constitutional remedies such as orders of invalidity,<sup>940</sup> and the development of traditional common law remedies.<sup>941</sup> The range of remedial options open to the courts include: those merely requiring the State to respect a right in the negative sense of non-interference; those requiring that the State has a duty to protect the rights against encroachment by others; those requiring the State to actively promote particular rights by developing policies to this effect; or the courts can make concrete orders for State agencies to fulfil the individual claimant's rights.<sup>942</sup> Furthermore, court orders may be declaratory (stating that laws or actions are in breach of a rights obligation, but leaving it to the state to devise a remedy); mandatory (requiring specific actions to be taken) or supervisory (requiring the relevant agency to report back within a set time-frame).<sup>943</sup>

All the usual remedies are also obtainable in respect of infringements to socio-economic rights and administrative justice.<sup>944</sup> However, concerns have been raised by a number of commentators, firstly, in relation to the tentativeness of the orders granted by the courts in respect of socio-economic rights<sup>945</sup> and secondly, in relation to the lack of compliance with such orders in respect of both socio-economic rights and the right to just

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<sup>939</sup> Sections 38 and 172(1)(b). See also Liebenberg *Socio-Economic Rights* 41-52; J Klaaren "Judicial Remedies" in M Chaskalson, J Kentridge, J Klaaren, G Marcus, M Spitz and S Woolman (ed) *Constitutional Law of South Africa* (2004). See the discussion in chapters three and four.

<sup>940</sup> Section 172(2)(a).

<sup>941</sup> Section 173.

<sup>942</sup> In *Zulu and Others v eThekweni Municipality* 2014 (8) BCLR 971 (CC) para 62. See the recent case *Black Sash Trust v Minister of Social Development* 2017 (5) BCLR 543 (CC).

<sup>943</sup> T Roux "Legitimizing Transformation: Political Resource Allocation in the South African Constitutional Court" in S Gloppen (ed) *Democratisation and the Judiciary* (2004); S Gloppen *Social Rights Litigation as Transformation: South African Perspectives* (2005).

<sup>944</sup> Section 8 of the Promotion of Administrative Justice Act, entitled "Remedies in proceedings for judicial review", is the first option for a complainant in search of a judicial administrative-law remedy. The section allows a court or tribunal to grant "any order that is just and equitable", including a number of remedies that are specifically listed. See Hoexter *Administrative Law* 2 ed 515-596 for a fuller discussion of these remedies.

<sup>945</sup> See generally M Pieterse M "Coming to terms with judicial enforcement of socio-economic rights" (2004) 20 *SAJHR* 396-399, 383; Brand "What are socio-economic rights for?" in *Rights and Democracy* 33. See chapter four.

administrative action.<sup>946</sup> The doctrine of separation of powers rears its head yet again when one examines the South African jurisprudence on the judicial enforcement of socio-economic rights and administrative justice. In relation to both sets of rights, as described in chapters four and five, problems of institutional roles and competence, poly-centricity of decision-making and policy-making and enforcement arise mostly in relation to remedies.

In socio-economic rights and administrative justice cases it is possible to “explore the possibilities of productive inter-institutional interaction” within a more expansive and malleable notion of separation of powers and judicial prowess - allowing for the innovative development of remedies.<sup>947</sup> Such remedies, in the context of a democratic developmental state should substantively enforce individual access to public benefits, and ensure through participatory and supervisory orders, resolutions to socio-economic issues. These remedies should not usurp the roles of other arms of government but should rather seek to include the deliberations of relevant organs, institutions and affected persons in solutions at an individual and systemic level.

Despite the wide range of remedial powers available to the courts, the Constitutional Court has in the past been severely criticised for the cautious use of its remedial arsenal and for being overly deferential in socio-economic rights cases.<sup>948</sup> In the case of unconstitutional infringements of the negative aspect of socio-economic rights the appropriate remedy in most cases will be a declaration of invalidity of the infringing law

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<sup>946</sup> De Villiers (2002) 18 SAJHR 320; Plaskett (2000) 11 SALJ 647; Liebenberg *Socio-Economic Rights*; Jagwanth “The Right to Administrative Justice”. See also: *Kate v MEC, Dept of Welfare, Eastern Cape* 2005 (1) All SA 745 (SE); *Vumazonke and others v Member of the Executive Council for Social Development, Eastern Cape Province* SECLD 25 November 2004 (Case Nos. 110/04, 826/04, 143/04, 2541/03) unreported.

<sup>947</sup> Pieterse (2004) 20 SAJHR 411 [footnotes omitted]. See also *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (1) BCLR 39 (CC) para 165; *Hoffmann v South African Airways* 2000 (11) BCLR 1211 (CC) para 42; *Minister of Health v Treatment Action Campaign* 2002 (10) BCLR 1033 (CC) paras 101, 106; *Fose v Minister of Safety and Security* 1997 (7) BCLR 851 (CC) para 18; *Bel Porto School Governing Body v Premier, Western Cape* 2002 (9) BCLR 891 (CC) para 181; Liebenberg *Socio-Economic Rights* 41-10; SAJHR 18 (2002) 177; K Pillay “Implementation of Grootboom: Implications for the Enforcement of Socio-economic Rights” (2002) 6 *Law, Democracy and Development* 255; C Scott & P Alston “Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney’s Legacy and Grootboom’s Promise” (2000) 16 SAJHR 206-68; W Trengove “Judicial Remedies for Violations of Socio-economic Rights” (1999) 1(4) *ESR* 8.

<sup>948</sup> Pieterse (2004) 20 SAJHR 414.

or conduct.<sup>949</sup> Where breaches of the positive obligations imposed by rights are concerned, two remedies have been employed by the courts namely, the structural interdict and declaratory relief.

The difficulties experienced by the Constitutional Court in effectively promoting the interests of the most vulnerable members of society and the transformative vision of the Constitution, requires a more robust, experimentalist and managerial remedial approach of the Court in order to produce faster relief to people without access to basic needs.<sup>950</sup> A more effective approach would be for the Court, in certain cases, to word orders in clear and specific terms, such as the orders in the social security cases of *Khosa* and *Black Sash* and to exercise supervisory jurisdiction.<sup>951</sup> Supervisory jurisdiction involves courts requiring the legislature or executive to report back to them on the measures taken to comply with a court order. In this way, a dynamic relationship of collaboration between the judiciary and the other branches of government on the intricacies of implementation may be instigated and accountability for execution of orders enhanced.<sup>952</sup> The courts have exceedingly done so more recently, for example in the *Pheko*<sup>953</sup> and *AllPay/Black Sash*<sup>954</sup> judgments. This “inter-institutional collaboration” is vital for transparency and accountability in a democratic developmental state.

<sup>949</sup> *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (1) BCLR 78 (CC) para 67 (infringement of the right to housing Magistrates’ Court Act remedied by declaration of invalidity and reading in.)

<sup>950</sup> See also M Swart “Left Out in the Cold? Crafting Constitutional Remedies for the Poorest of the Poor” (2005) *SAJHR* 215.

<sup>951</sup> *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) BCLR 569 (CC) para 98 (where the words “or permanent resident” were read into certain sections of the Social Assistance Act 59 of 1992). *Black Sash Trust v Minister of Social Development* 2017 (5) BCLR 543 (CC). See also: Wesson (2004) 20 *SAJHR* 306-307; Pieterse (2004) 20 *SAJHR* 414; Trengove (1999) 1(4) ESR 8.

<sup>952</sup> Wesson (2004) 20 *SAJHR* 307; Pieterse (2004) 20 *SAJHR* 414; Trengove (1999) 1(4) ESR 10.

<sup>953</sup> *Pheko v Ekurhuleni Metropolitan Municipality* 2015 (6) BCLR 711 (CC); *Pheko v Ekurhuleni Metropolitan Municipality* (No 3) 2016 (10) BCLR 1308 (CC). See chapter four.

<sup>954</sup> *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) BCLR 1 (CC); *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* (No 2) 2014 (6) BCLR 641 (CC); *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2015 (6) BCLR 653 (CC); *Black Sash Trust v Minister of Social Development* 2017 (5) BCLR 543 (CC) and *Black Sash Trust v Minister of Social Development (Freedom Under Law NPC Intervening)* 2017 (9) BCLR 1089 (CC).



Commentators have argued that administrative law proceedings are ineffective because they provide little or no relief for successful applicants.<sup>955</sup> In the post-constitutional era, the courts have not granted substantive relief in a number of cases when administrative law principles have been breached and rather set the decision of the administrative body aside and referred it back to the official or body for reconsideration.<sup>956</sup> However, the courts have stepped beyond their deference to administrative bodies, for example, in the area of social security benefits by granting arrear payments as well as interest on their claims to applicants who were denied their rights to administrative justice.<sup>957</sup> They have also intervened in the social grants delivery system to ensure that millions of people continue to receive poverty alleviation measures to which they are legally entitled.<sup>958</sup>

These remedial actions illustrate how the constitutional principles of justification and accountability can be utilised to bring substantive relief in cases where socio-economic rights and administrative justice intersect. With administrative law traditionally showing reluctance to grant substantive relief in the case of a successful administrative challenge, it has not been seen as an effective tool for social justice.<sup>959</sup> However, the social security, education and housing cases illustrate that innovative remedies can be created in administrative law, based on the constitutional values of justification and accountability whilst still respecting the distinction between appeal and review.

Non-compliance with such court orders remains a problem though, as seen in the *AllPay*<sup>960</sup> cases. In *Jayiya*, the court noted that “[w]holesale non-compliance with court

<sup>955</sup> Hoexter (2000) 17 SALJ 484; Jagwanth “The Right to Administrative Justice” 17.

<sup>956</sup> See *Premier, Mpumalanga Executive Committee, Association of State-aided Schools, Eastern Transvaal and Erf One Six Seven Orchards CC v Greater Johannesburg Metropolitan Council* 1999 (1) SA 104 (SCA) . Section 8(1)(c)(ii)(aa) of PAJA also provides that a court may only substitute its decision for that of the decision-maker in exceptional circumstances.

<sup>957</sup> The court in *Jayiya v MEC for Welfare, Eastern Cape Government* [2003] 2 All SA 223 (SCA) appears to have rejected the payment of interest on back-pay and contempt proceedings. See discussion of these cases in: Jagwanth “The Right to Administrative Justice” 19; Liebenberg *Socio-Economic Rights*; De Villiers 18 SAJHR 320; Plaskett (2000) 11 SALJ 647.

<sup>958</sup> *Black Sash Trust v Minister of Social Development* 2017 (5) BCLR 543 (CC) and *Black Sash Trust v Minister of Social Development (Freedom Under Law NPC Intervening)* 2017 (9) BCLR 1089 (CC).

<sup>959</sup> Jagwanth “The Right to Administrative Justice” 19.

<sup>960</sup> *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) BCLR 1 (CC); *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 (6) BCLR 641 (CC); *AllPay*

orders is a distressing phenomenon in the Eastern Cape that has caused the courts in that province to try and devise ways of coming to the assistance of social welfare applicants whom the provincial government has failed.”<sup>961</sup> The applicant in this case firstly claimed a lump sum back-payment of her disability grant and interest thereupon by way of constitutional damages and secondly she attempted to hold the state liable for contempt of court. Conradie J refused to order the payment of interest on back pay as part of constitutional damages or hold the state liable for contempt of court where state officials had failed to carry out their obligations because this kind of relief was not generally provided for under PAJA. In a significant decision, Froneman J in the Eastern Cape High Court in *Kate* declared government officials in contempt of court for failing to obey court orders and ordered the respondent to pay the applicant the outstanding amount of her social grant as well as interest on the monthly amount she should have received.<sup>962</sup> Froneman J expressed the view that since the remedies in PAJA are couched in wide, open-ended and permissive terms, these remedies do not preclude appropriate constitutional relief under section 38. In the SCA, the court re-affirmed an award for constitutional damages to recompense *Kate* for the breach of her right to social security.<sup>963</sup> In the *Black Sash* case, the Minister of Social Development was joined as a party to the case in her individual capacity, and the Constitutional Court is considering whether to hold her personally liable for the costs incurred in the case. The Constitutional Court ordered an investigation into the Social Development Minister’s personal liability over the social grants matter and sought feedback within 14 days.<sup>964</sup>

Ultimately, the proof of efficacy of remedies for rights’ breaches is whether it holds the state accountable and leads to a sustained change in the situation for poor litigants. In a democratic developmental state, the administration, the executive and the legislature

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*Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2015 (6) BCLR 653 (CC).

<sup>961</sup> *Jayiya v MEC for Welfare, Eastern Cape Government* [2003] 2 All SA 223 (SCA). See also Swart (2005) SAJHR 215.

<sup>962</sup> *Kate v MEC, Dept of Welfare, Eastern Cape* 2005 (1) All SA 745 (SE).

<sup>963</sup> *MEC for the Department of Welfare v Kate* 2006 (4) SA 478 (SCA) 33.

<sup>964</sup> *Black Sash Trust v Minister of Social Development (Freedom Under Law NPC Intervening)* 2017 (9) BCLR 1089 (CC).

must be held accountable for their functions, for ensuring participatory democratic principles are upheld, and for bringing about systemic, socio-economic transformation in a coherent, incremental and directed manner. Remedies are the tool the courts use, to hold the other spheres, organs of state and the private sector, to their tasks. In cases where administrative justice and socio-economic rights are concerned, the duty of the courts is even greater. Participatory remedies such as meaningful engagement and enforcement through supervisory measures, in cases of administrative justice and socio-economic rights, can serve to enhance participatory democracy and accountability of state institutions in a democratic developmental state. The judiciary in South Africa has been extremely powerful in holding the legislature, the executive and the administration, in all spheres of government, to account and thereby upholding constitutional democracy. The remedies at its disposal, alongside the legitimacy that it has managed to gain through its independent and professional stance, provide a strong platform for furthering socio-economic transformation in a participatory democracy.

## **6.7 Conclusion**

The rights-based approach to multi-dimensional poverty, founded on the international human rights framework, encompasses socio-economic rights as well as civil and political rights. The approach considers all these rights to be indivisible, inter-related and inter-dependent. Furthermore, it includes strong demands for participation in decisions that affect peoples' lives, and provides the basis for an analysis of the structural causes of poverty, focusing on discrimination, exclusion and inequality. The evolving, interdependent human rights approach to poverty in the South African jurisprudence, also acknowledges the critical role of civil, political, socio-economic rights and participatory rights in reducing poverty in the country. In this chapter, I examined the interface between socio-economic rights and administrative justice in addressing a multi-dimensional conception of poverty, in a democratic developmental state.

Building on the model of judicial prowess and an experimentalist, substantive approach to socio-economic rights adjudication proposed in chapter four, in this section I discuss a

“democratic incremental” approach to the adjudication of socio-economic and administrative justice rights. The characteristics of this approach involve experimentalist, substantive incremental, pro-active, managerial and autonomous adjudicatory modes. The interdependent adjudication of socio-economic rights and administrative justice, utilising a “democratic incremental” approach, can contribute to the realisation of a South African democratic developmental state. The democratisation of the courts and intensified accountability of the executive and the administration for effective policies and distribution of public goods, can better serve the transformative project of a South African democratic developmental state. It also requires an interdependent, participatory and substantive interpretation of socio-economic and administrative justice rights that individually and systemically address the multi-dimensional challenges of poverty.

I proposed that the scope of application of socio-economic rights and administrative justice is complementary in that socio-economic rights apply to the actions or inactions of the executive, the legislature as well as private actors, and the right to administrative justice applies to administrative action. Under the sets of rights together, the courts can evaluate the conceptualisation as well as the implementation of law and policy that seeks to address poverty and inequality, through the various stages of policy formulation and implementation. This ensures transparency and accountability for the effective provision of socio-economic goods to people affected by poverty.

I then advocated for a judicial interpretation of the “reasonableness” requirements attached to socio-economic rights and administrative justice (in relation to socio-economic rights) that elucidates the substance of decisions and measures taken to give effect to material needs. The courts have thus far only considered the substantive content of socio-economic rights and administrative justice in a limited number of cases over the past few years. I argue that the court should expand upon the values, norms and obligations of socio-economic rights, in order to guide efforts to address long-term, structural poverty, as the aim of a democratic developmental state.

Finally, I considered the range of innovative remedial options the courts have applied in a complementary way in socio-economic rights and administrative justice cases. They have required the State to: respect a right in the negative sense of non-interference; protect the rights against infringement by others; actively promote particular rights by developing and implementing policies; and fulfil the individual claimant's rights. I espoused the evolution of the courts' use of supervisory orders (structural interdicts) to ensure transparency and accountability of the State in fulfilling its duties in cases where socio-economic rights and administrative justice are concerned. I also supported the expansion of "meaningful engagement" orders to the various socio-economic rights, as participatory mechanisms of empowerment for poor people, alongside administrative procedures. This is required in a democratic developmental state built on openness, accountability and responsiveness.

The various institutional role-players in the South African democratic developmental system of government have a combined obligation to design comprehensive poverty reduction policies and laws and to execute poverty reduction measures. From a multi-dimensional, human rights-based poverty perspective, administrative justice and socio-economic rights work interdependently to ensure that both the empowerment and material dimensions are addressed. An interconnected view of the role of socio-economic rights and administrative justice in addressing poverty is needed to guide the development of policy and law by the executive and the legislature, as well as the review thereof by the judiciary, within a democratic developmental state.

## CHAPTER 7: Conclusion

### 7.1 Introduction

The central focus of this dissertation was to examine the interdependence of socio-economic rights and the right to administrative justice in addressing poverty under constitutional law and international law, in a South African democratic developmental state. The hypothesis behind the research is based on an integrated human rights approach to poverty, as asserted by the South African courts and framed in international law. It affirms that socio-economic and administrative justice rights are profoundly complementary and can be strengthened as tools for addressing poverty in a democratic developmental state. This analysis was accomplished within the recognised framework of a transformative Constitution that seeks to remedy South Africa's past, to strive towards the egalitarian, empowered transformation of our society and to attain the concrete alleviation of the realities of poverty and hardship.

Full transformation from an apartheid society requires both a reconfiguration of the legal-political structures that upheld it, as well as the redress of the devastating social and economic consequences of its policies and laws. The inclusion of justiciable civil, political and socio-economic rights in the Bill of Rights of the South African Constitution symbolises this understanding. The realisation of political and socio-economic transformation requires collaboration between the legislature, the executive, the judiciary and all organs of state, as well as the private sector, to “respect, protect, promote and fulfil” the Bill of Rights in its entirety. South African citizens and residents, and broader civil society, are also vested with rights to pressurise state and non-state actors to enforce these mandates through litigation, the political process, involvement in public policy, law and administrative decision-making processes and political action.

## 7.2 Transformative constitutionalism in a democratic developmental state

This dissertation is built on the theoretical discourse of transformative constitutionalism and participatory democracy, which underpin the South African democratic developmental state, discussed in chapter two. Over the past decade, the South African developmental state, as postulated in the National Development Plan: Vision 2030 ('NDP'), has surpassed the notion of a South African welfare state. A developmental state has effective state capacity, synergistic state-society relations, a social welfare net and intervenes strategically in the economy to promote socio-economic development. A fundamental feature of the South African *democratic* developmental state described by Evans, is that it must be people-oriented and capable of addressing the socio-economic needs of its entire population, especially the poor, marginalised and historically disadvantaged. It must also necessarily be accountable, responsive and open. It is the current conception of the South African state that should guide the courts and the development of policy and law in relation to poverty reduction, both in terms of substance and process.

Various policies and programmes have sought to advance socio-economic transformation over the past two decades, but the state has failed to adequately implement them all. The NDP is still contested ground and with the almost daily uncovering of state corruption in government and State Owned Enterprises ('SOE'), the democratic developmental state project has been severely undermined over the last decade since President Jacob Zuma became South Africa's president. The state no longer functions as an "autonomous institution" in the interests of its citizens, but is captured by substantial local and foreign private interests. The media, civil society and the courts have continued to play their independent roles in exposing the extensive corruption and holding the state accountable. It is the combined obligation of these various, key institutional role-players in the South African democratic developmental state to continue to ensure that critical resources needed for poverty reduction are channelled appropriately and effectively.



### 7.3 Integrated human rights approach to poverty

The multi-faceted situation of poverty in South Africa, described in chapter three, has been significantly ameliorated in the time of formal democracy, but still requires widespread redress. The normative values in the Constitution, and in particular the Bill of Rights, have a critical role to play in advancing poverty reduction through the courts, the legislature and the executive. The international and national human rights discourse in relation to poverty reduction, illustrates that the reduction of poverty requires a multi-dimensional approach in policy and law. The multi-dimensional nature of poverty from a development economist's perspective is directly linked to the various socio-economic and civil and political rights identified in international human rights law and in the South African Bill of Rights. Both socio-economic rights and civil and political rights, such as the right to freedom of information and administrative justice, are relevant to poverty reduction. As Sen points out in *Development as Freedom*,<sup>965</sup> the reduction of poverty needs to be tangibly felt and experienced, through an individual experience of autonomy and empowerment and through a systemic experience of improvement in the living conditions of poor people.

This dissertation examined the interconnectedness of socio-economic rights and the right to just administrative action in addressing multi-dimensional poverty in a democratic developmental state. A number of cases related to the rights to social security, education, housing and water in particular, that have come before the Constitutional Court over the past 22 years, demonstrated the potential complementarity between socio-economic rights and the right to just administrative action in addressing poverty. In chapters four and five I investigated the conceptual foundations and jurisprudence of socio-economic rights and administrative justice in the context of a transformative Constitution and a democratic developmental state. I then discussed in chapter six, the ways in which they are mutually supportive and reinforcing as partners in the project of poverty reduction, with distinct but interconnected roles to play.

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<sup>965</sup> A Sen *Development as Freedom* (1999).

## 7.4 Substantive rights and participatory democracy

In order for the full impact of the rights in the Constitution to be felt amongst the poor, substance must be given to these rights, and not mere procedural form and hollow rhetoric. In order to get closer to achieving this, the content of socio-economic rights and administrative justice must be substantively interpreted through “democratising” the Courts, by involving litigants, experts, the legislature and the executive in incrementally developing the principles, norms and content of such rights. I proposed a role for the courts, which I termed “judicial prowess”, depicting a flexible, skillful and context-appropriate adjudicatory approach that does not undermine the separation of powers doctrine. This adjudicatory role in relation to cases where socio-economic rights and administrative justice meet, could be further enhanced by applying a “democratic incrementalist” approach. In the context of a democratic developmental state, this type of review, would simultaneously allow for an incremental substantive interpretation of rights by the courts on a case by case basis, and the participation of various roleplayers including the executive, litigants and technical experts. It is modelled on the democratic experimentalist and managerial modes, but with a stronger substantive interpretive role for the judiciary and other relevant stakeholders.

The primary role of socio-economic rights is the provision of the material needs of people, namely water, housing, income (social security), education and food. Socio-economic rights have been used as a tool in litigation and in monitoring and advocacy related to the government’s obligations to secure for all members of society a basic set of goods – education, social security, health care, food, water, shelter, access to land and housing. Justiciable socio-economic rights are able to assist in monitoring the State’s realisation of its constitutional obligations to the poor, and ultimately holding the State accountable for these obligations. However, there are limits to what these rights have been able to achieve. This is due, in particular, to the reluctance of the court to interpret the substantive content of these rights, the deference the courts have shown, and the difficulties experienced in relation to the enforcement of remedies.

Sen's conception of "human capabilities" takes socio-economic rights beyond this primary role into the creation of agency and empowerment through people's participation in decision-making regarding their basic needs. The court's adjudicatory approach to socio-economic rights should thus include a participatory dimension by ensuring that litigants, communities and affected parties are involved in the conceptualisation and implementation of their socio-economic rights. The voices of the poor and vulnerable are a legitimate aspect of our participatory democracy and should be given opportunities to be heard beyond the formalised elective and legislative processes. Their participation should be included in the policy formulation processes, programmatic processes and administrative decision-making. Various cases before the courts over the past two decades have affirmed the importance of participatory democracy in South Africa's new dispensation. Participatory remedies such as meaningful engagement, also promote participatory democracy, whilst the increasing use of structural enforcement orders advance the principles of accountability, responsiveness and openness.

The primary role of the right to administrative justice is the facilitation of the right of people who are recipients of government services to participate in the decisions affecting their access to such services and to compel government actors to justify their conduct with reference to their constitutional obligations. A South African analysis of the potential (and actual practice) of administrative law illustrates the critical role that it can play in poverty reduction in relation to access to material benefits, as well as reinforcing economically impoverished people's sense of empowerment and autonomy over their lives.

The rising field of "global administrative law" is useful to understanding the broader purpose and substantive content of administrative law in an increasingly globalised world and in a democratic, developmental state. The basis of global administrative law is an accountability deficit created by the emergence of transnational regulatory power.<sup>966</sup> The scope includes substantive law that defines the powers and limits of regulators under

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<sup>966</sup> Kingsbury (2009) *European Journal of International Law* 16.

human rights treaties and case law describing the circumstances under which state organs can interfere with individual liberties. The normative bases of global administrative law thus resonate with the intersection between administrative justice and socio-economic rights under a transformative constitution in a democratic developmental state. These normative conceptions are: internal administrative accountability; protection of individual rights or the rights of states; and the promotion of democracy.

Global administrative law comprise some broad basic legal principles and requirements of both a procedural and a substantive nature. The first foundational principle is the requirement of procedural participation and transparency. This encompasses the right of affected individuals to have their views and relevant information considered before a decision is taken. Participation in global administrative proceedings has included NGOs representing affected social and economic interests, who apply pressure for access to information and “decisional transparency”. They also promote accountability of administrative decision-making. The second requirement is that of providing reasons for administrative decisions. Finally, when individual rights are affected, global administrative law should embody substantive standards for administrative action, such as “proportionality, rational relation between means and ends, use of less restrictive means, or legitimate expectations”.<sup>967</sup> Interference with many individual rights can be justified, but only if the interference is proportionate to the legitimate public objective pursued.

The right to administrative justice is an important participatory and substantive vehicle for protecting socio-economic rights in the South African Courts. Recently, in cases relating to education, water, housing and basic services, the interpretation of administrative justice requirements of procedural fairness and reasonableness in particular, have brought mixed results for the realisation of socio-economic rights for the poor. Since administrative law and administrative justice rights comprises the general principles of law which regulate the organisation of administrative institutions and the

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<sup>967</sup> Kingsbury B “The concept of ‘law’ in global administrative law” *The European Journal of International Law* (2009) 20(1) 23-57.

fairness and efficacy of the administrative process, it has an important role to play in facilitating poor people's right to be heard and to participate in socio-economic decision-making that affects their rights. Furthermore, the right to reasonable administrative action has the potential of forcing the administration to account for their actions in relation to socio-economic rights, based on the substantive and procedural elements of the right to administrative justice.

Socio-economic rights and the right to administrative justice are distinct, interlinked, interdependent and mutually reinforcing in the context of overcoming poverty and inequality, in a democratic developmental state. The theoretical and empirical foundations laid out in this dissertation, underpin the argument that, for an individual, family or community to be freed from the cycle of poverty, their material needs must be met and they must be able to participate in the decisions that affect their lives. Sen's "human capabilities" theory embodies this conception of poverty, alongside an interdependent human rights approach to poverty. It also speaks to the important role of process and substance in the realisation of rights.

In order to strengthen this complementarity, the courts should apply a democratic incrementalist adjudicatory method to the interpretation and enforcement of these sets of rights, in poverty-related cases. This requires the judiciary to continue to expand the use of "meaningful engagement" as a participatory tool in the interpretation and implementation of other socio-economic rights besides housing and education rights. Collaboration amongst litigants, the executive branch, civil society organisations and technical experts, facilitated by the courts, promotes participatory democracy and emboldened solution-finding to socio-economic issues, along the lines of democratic experimentalism. The content of rights can thus be determined incrementally, beginning with a minimal level of basic needs, by relevant roleplayers in each case, and applied systemically beyond the parties to the case. The courts can thus begin to build a body of jurisprudence in the third wave of socio-economic rights cases, that engages more deeply and "democratically" with the substance of socio-economic rights, and incrementally

determines needs and necessary public responses. Administrative justice rights and structural enforcement orders then procedurally support the courts to ensure that the executive and the administration delivers on those promises.

## 7 5 Conclusion

At this moment in South Africa's history, whilst the public coffers are looted by private interests in collusion with elected and public officials, and the majority of the population continue to live in poverty, the courts have a critical role to play. While there are many of those holding prime Cabinet positions, or in the employ of government departments or SOE's, or securing state contracts who are part of this insidious web of state capture, our independent judiciary is the last beacon holding this democratic developmental state accountable to the people it is meant to serve.

This dissertation thus sought to expound the judicial interpretation and enforcement of socio-economic rights and administrative justice and their interactive potential to address poverty and inequality. A complementary judicial interpretation of these rights is possible by engaging more substantively and collaboratively with the normative content of socio-economic rights and the right to just administrative action. Courts as "active democratic" institutions can also enhance the elements of participatory democracy and accountability to better serve the transformative project of the Constitution. The right to administrative justice and socio-economic rights are complementary tools to tackle poverty and inequality in a democratic developmental state. I have argued that developing the interlinkages between administrative justice and socio-economic rights supports the vision of a democratic developmental state and effective socio-economic transformation.

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*Carephone (Pty) Ltd v Marcus* 1999 3 SA 304 (LAC)

*Carmichele v Minister of Safety and Security* 2001 (10) BCLR 995 (CC)

*City of Cape Town v Rudolph* 2004 (5) SA 39 (C)

*City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) BCLR 150 (CC)

*City of Johannesburg v Mazibuko* 2009 (8) BCLR 791 (SCA)

*City of Johannesburg v Rand Properties (Pty) Ltd* 2006 (6) BCLR 728 (W)

*City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* 2010 (3) SA 589 (SCA)

*Daniels v Scribante* 2017 (8) BCLR 949 (CC)

*Doctors for Life International v The Speaker of the National Assembly* 2006 (12) BCLR 1399 (CC)

*Du Plessis v De Klerk* 1996 (5) BCLR 658 (CC)

*Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 (5) BCLR 618 (CC)

*Electronic Media Network Limited v e.tv (Pty) Limited* 2017 (9) BCLR 1108 (CC)

*Federation of Governing Bodies for South African Schools v Member of the Executive Council for Education, Gauteng* 2016 (8) BCLR 1050 (CC)

*Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458

*Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC)

*Governing Body of the Juma Musjid Primary School v Ahmed Asruff Essay* 2011 (8) BCLR 761 (CC)

*Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC)

*Grey's Marine Hout Bay and Others v Minister of Public Works* 2005(6) SA 313 (SCA)

*Grootboom v Oostenberg Municipality* 2000 (3) BCLR 277 (C)

*Gundwana v Steko Development CC* 2011 (8) BCLR 792 (CC)

*Hattingh v Juta* 2013 (5) BCLR 509 (CC)

*Head of Department, Department of Education, Free State Province v Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School* 2013 (9) BCLR 989 (CC)

*Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (3) BCLR 177 (CC)

*Hoffmann v South African Airways* 2000 (11) BCLR 1211 (CC)

*Hotz v University of Cape Town* 2017 (7) BCLR 815 (CC)

*Jafttha v Schoeman; Van Rooyen v Stoltz* 2005 (1) BCLR 78 (CC)

*Jayiya v MEC for Welfare, Eastern Cape Government* [2003] 2 All SA 223 (SCA)

*Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)* 1999 (2) BCLR 139 (CC)

*Joseph v City of Johannesburg* 2010 (3) BCLR 212 (CC)

*Kaunda v President of the RSA* 2004 (10) BCLR 1009 (CC)

*Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) BCLR 569 (CC)

*Kiliko v Minister of Home Affairs* 2006 (4) SA 114 (C)

*Kwalindile Community v King Sabata Dalindyebo Municipality; Zimbane Community v King Sabata Dalindyebo Municipality* 2013 (5) BCLR 531 (CC)

*KwaZulu-Natal Joint Liaison Committee v Member of the Executive Council, Department of Education, KwaZulu-Natal* 2013 (6) BCLR 615 (CC)

*Land Access Movement of South Africa v Chairperson of the National Council of Provinces* 2016 (10) BCLR 1277 (CC)

*Lee v Minister of Correctional Services* 2013 (2) BCLR 129 (CC)

*Lingwood v Unlawful Occupiers of R/E ERF 9 Highlands* 2008 (3) BCLR 325 (W)

*Malan v City of Cape Town* 2014 (11) BCLR 1265 (CC)



*Mamahule Communal Property Association v Minister of Rural Development and Land Reform* 2017 (7) BCLR 830 (CC)

*Mamba v Minister of Social Development* Case No 36573/08 (T) (unreported judgment of 12 August 2008 and Order dated 21 August 2008)

*Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 (5) BCLR 449 (CC)

*Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC)

*Matatiele Municipality v President of the RSA (No 2)* 2007 (1) BCLR 47 (CC)

*Mazibuko v City of Johannesburg* 2010 (3) BCLR 239 (CC)

*Mazibuko v City of Johannesburg (Centre on Housing Rights and Evictions as amicus curiae)* [2008] 4 All SA 471 (W)

*MC Denneboom Service Station CC v Phayane* 2014 (12) BCLR 1421 (CC)

*MEC for Education in Gauteng Province v Governing Body of Rivonia Primary School* 2013 (12) BCLR 1365 (CC)

*MEC for the Department of Welfare v Kate* 2006 (4) SA 478 (SCA)

*Minister of Basic Education v Basic Education for All* 2016 (4) SA 63 (SCA).

*Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC)

*Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd* [2003] 2 All SA 616 (SCA)

*Minister of Finance v Van Heerden* 2004 (11) BCLR 1125 (CC)

*Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (8) BCLR 872 (CC)

*Minister of Health v Treatment Action Campaign (No 2)* 2002 (10) BCLR 1033 (CC)

*Minister of Home Affairs v Watchenuka* 2004 (1) SA 21 (SCA)

*Minister of Home Affairs v Scalabrini Centre* 2013 (6) SA 421 (SCA)

*Minister of Public Works v Kyalami Ridge Environmental Association (Mukhwevho Intervening)* 2001 (7) BCLR 652 (CC)

*Mohamed v President of the Republic of South Africa (Society for the Abolition of the Death Penalty in South Africa Intervening)* 2001 (7) BCLR 685 (CC)

*Molusi v Voges N.O.* 2016 (7) BCLR 839 (CC)

*Motswagae v Rustenburg Local Municipality* 2013 (3) BCLR 271 (CC)

*N v Government of Republic of South Africa and Others (No 1)* 2006 (6) SA 543 (D)

*National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (1) BCLR 39 (CC)

*National Director of Public Prosecutions v Freedom Under Law* 2014 (4) SA 298 (SCA)

*New Clicks South Africa (Pty) Ltd v Tshabalala-Msimang* 2005 (2) SA 530 (C)

*Ngaka Modiri Molema District Municipality v Chairperson, North West Provincial Executive Committee* 2015 (1) BCLR 72 (CC)

*Nokotyana v Ekurhuleni Metropolitan Municipality* 2010 (4) BCLR 312 (CC)

*Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (5) BCLR 475 (CC)

*Occupiers of Erf 101, 102, 104 and 112 Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd* 2010 (4) BCLR 354 (SCA)

*Occupiers of Erven 87 and 88 Berea v De Wet* 2017 (5) SA 346 (CC)

*Occupiers of Portion R25 of the Farm Mooiplaats 355JR v Golden Thread Limited* 2012 (4) BCLR 372 (CC)

*Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd* 2012 (4) BCLR 382 (CC)

*Oppelt v Head: Health, Department of Health Provincial Administration: Western Cape* 2015 (12) BCLR 1471 (CC)

*Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza* 2001 (10) BCLR 1039 (SCA)

*Pharmaceutical Manufacturers Association of South Africa: In Re Ex Parte President of the Republic of South Africa* 2000 (3) BCLR 241 (CC)

*Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 (4) BCLR 388 (CC)

*Pheko v Ekurhuleni Metropolitan Municipality* 2015 (6) BCLR 711 (CC) ('Pheko No 2')

*Pheko v Ekurhuleni Metropolitan Municipality (No 3)* 2016 (10) BCLR 1308 (CC)

('Pheko No 3')

*Pitje v Shibambo* 2016 (4) BCLR 460 (CC)

*Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC)

*Poverty Alleviation Network v President of the Republic of South Africa* 2010 (6) BCLR 520 (CC)

*Premier Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) BCLR 151 (CC)

*President of the Republic of South Africa v South African Rugby Football Union* 1999 (10) BCLR 1059 (CC)

*President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA, Amici Curiae)* 2005 (8) BCLR 786 (CC)

*Prinsloo v Van der Linde* 1997 (6) BCLR 759 (CC)

*Rail Commuters Action Group and Others v Transnet Limited t/a Metro Rail and Others* 2003 (5) SA 518 (C)

*Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (4) BCLR 301 (CC)

*Rates Action Group v City of Cape Town* 2004 (12) BCLR 1328 (C)

*Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 (9) BCLR 847 (CC)

*Roman v Williams* NO 1998 1 SA 270 (C) 284H-285A

*S v Mabena* 2007 (1) SACR 482 (SCA)

*S v Makwanyane* 1995 (6) BCLR 665 (CC)

*Schubart Park Residents' Association and Others v City of Tshwane* 2013 (1) BCLR 68 (CC)

*Section 27 v Minister of Education* 2013 (2) BCLR 237 (GNP)

*Sidumo v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC)

*Soobramoney v Minister of Health (Kwazulu-Natal)* 1997 (12) BCLR 1696 (CC)

*South African Informal Traders Forum v City of Johannesburg; South African National Traders Retail Association v City of Johannesburg* 2014 (6) BCLR 726 (CC)

*State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd* 2017 (2) SA 63 (SCA)

*The Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality* 2012 (9) BCLR 951 (CC)

*The Occupiers, Shulana Court, 11 Hendon Road, Yeoville v Mark Lewis Steele* 2010 (9) BCLR 911 (SCA)

*Union of Refugee Women v Private Security Industry Regulatory Authority* 2007 (4) BCLR 339 (CC)

*Vumazonke v MEC for Social Development and Welfare for Eastern Cape Province* (EC) 050/2004) [2004] ZAECHC 40 (25 November 2004)

*Walele v City of Cape Town* 2008 (11) BCLR 1067 (CC)

*Wessels v Minister of Justice and Constitutional Development* 2010 (1) SA 128 (GNP)

*Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Others* 2011 (5) SA 87 (WCC)

*Zondi v MEC for Traditional and Local Government Affairs* 2005 (4) BCLR 347 (CC)

*Zulu v eThekweni Municipality* 2014 (8) BCLR 971 (CC)

## APPENDIX A: TABLE OF SOCIO-ECONOMIC RIGHTS CASES

<b>1995-2005 (8 cases)</b>
<b>S 25 Property (1)</b> <i>Jaftha v Schoeman; Van Rooyen v Stoltz</i> 2005 (1) BCLR 78 (CC) ('Jaftha')
<b>S 26 Housing (4)</b> <i>Government of the RSA v Grootboom</i> 2000 (11) BCLR 1169 (CC) ('Grootboom'); <i>Minister of Public Works v Kyalami Ridge Environmental Association (Mukhwevho Intervening)</i> 2001 (7) BCLR 652 (CC) ('Kyalami Ridge'); <i>Port Elizabeth Municipality v Various Occupiers</i> 2004 (12) BCLR 1268 (CC) ('PE Municipality'); <i>President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA, Amici Curiae)</i> 2005 (8) BCLR 786 (CC) ('Modderklip')
<b>S 27 Health (2)</b> <i>Soobramoney v Minister of Health (KwaZulu-Natal)</i> 1997 (12) BCLR 1696 (CC) ('Soobramoney'); <i>Minister of Health v Treatment Action Campaign (No 2)</i> 2002 (10) BCLR 1033 (CC) 2002 (5) ('TAC')
<b>S 27 Social Security (1)</b> <i>Khosa v Minister of Social Development; Mahlaule v Minister of Social Development</i> 2004 (6) BCLR 569 (CC) ('Khosa')
<b>2008-2017 (44 cases)</b>
<b>S 25 Property (5)</b> <i>Zimbane Community v King Sabata Dalindyebo Municipality</i> 2013 (5) BCLR 531 (CC) ('Dalindyebo Municipality'); <i>Agri South Africa v Minister of Minerals and Energy</i> 2013 (7) BCLR 727 (CC) ('Agri South Africa'); <i>Land Access Movement of South Africa v Chairperson of the National Council of Provinces</i> [2016] ZACC 22 ('Land Access Movement'); <i>Mamahule Communal Property Association v Minister of Rural Development and Land Reform</i> 2017 (7) BCLR 830 (CC) ('Mamahule'); <i>Daniels v Scribante</i> (CCT50/16) [2017] ZACC 13 (11 May 2017) ('Daniels')
<b>S 26 Housing (25)</b> <i>Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of</i>

*Johannesburg* 2008 (5) BCLR 475 (CC) ('*Olivia Road*'); *Machele v Mailula* 2009 (8) BCLR 767 (CC) (2009) ('*Machele*'); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 (9) BCLR 847 (CC) ('*Joe Slovo*'); *Joseph v City of Johannesburg* 2010 (3) BCLR 212 (CC) 30 ('*Joseph*'); *Abahlali Basemjondolo Movement SA v Premier of the Province of Kwazulu-Natal* 2010 (2) BCLR 99 (CC) ('*Abahlali*'); *Nokotyana v Ekurhuleni Metropolitan Municipality* 2010 (4) BCLR 312 (CC) ('*Nkotyana*'); *Gundwana v Steko Development CC* 2011 (8) BCLR 792 (CC) ('*Gundwana*'); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) BCLR 150 (CC) ('*Blue Moonlight*'); *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (5) BCLR 449 (CC) ('*Maphango*'); *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 (4) BCLR 388 (CC) ('*Pheko*'); *Occupiers of Portion R25 of the Farm Mooiplaats 355JR v Golden Thread Limited* 2012 (4) BCLR 372 (CC) ('*Mooiplaats*'); *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd* 2012 (4) BCLR 382 (CC) ('*Skurweplaas*'); *The Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality* 2012 (9) BCLR 951 (CC) ('*Saratoga Avenue*'); *Schubart Park Residents' Association and Others v City of Tshwane* 2013 (1) BCLR 68 (CC) ('*Schubart Park*'); *Motswagae and Others v Rustenburg Local Municipality* 2013 (3) BCLR 271 (CC) ('*Motswagae*'); *Hattingh v Juta* 2013 (5) BCLR 509 (CC) ('*Hattingh*') (eviction); *Zulu v eThekweni Municipality* 2014 (8) BCLR 971 (CC) ('*Zulu*'); *Malan v City of Cape Town* 2014 (11) BCLR 1265 (CC) ('*Malan*'); *MC Denneboom Service Station CC v Phayane* 2014 (12) BCLR 1421 (CC) ('*Denneboom*'); *Ngaka Modiri Molema District Municipality v Chairperson, North West Provincial Executive Committee* 2015 (1) BCLR 72 (CC) ('*Ngaka Modiri Molema*'); *Pheko v Ekurhuleni Metropolitan Municipality* 2015 (6) BCLR 711 (CC) ('*Pheko No 2*'); *Pitje v Shibambo* 2016 (4) BCLR 460 (CC) ('*Pitje*'); *Molusi v Voges NO* 2016 (7) BCLR 839 (CC) ('*Molusi*'); *Pheko v Ekurhuleni Metropolitan Municipality (No 3)* 2016 (10) BCLR 1308 (CC) ('*Pheko No 3*'); *Occupiers of Erven 87 and 88 Berea v De Wet* 2017 (5) SA 346 (CC) ('*Occupiers Berea*')

### **S 27 Health (1)**

*Oppelt v Head: Health, Department of Health Provincial Administration: Western Cape* 2015 (12) BCLR 1471 (CC) ('*Oppelt*')

### **S 27 Water (1)**

*Mazibuko v City of Johannesburg* 2010 (3) BCLR 239 (CC) ('*Mazibuko*')

#### **S 27 Social Security (4)**

*AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) BCLR 1 (CC) ('AllPay 1'); *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 (6) BCLR 641 (CC) ('AllPay 2'); *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2015 (6) BCLR 653 (CC) ('AllPay 3'); *Black Sash Trust v Minister of Social Development* [2017] ZACC 8; 2017 (5) BCLR 543 (CC) and *Black Sash Trust v Minister of Social Development (Freedom Under Law NPC Intervening)* 2017 (9) BCLR 1089 (CC) ('Black Sash')

#### **S 29 Education (7)**

*Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) BCLR 99 (CC) ('Hoërskool Ermelo'); *Governing Body of the Juma Musjid Primary School v Ahmed Asruff Essay NO* 2011 (8) BCLR 761 ('Juma Musjid'); *KwaZulu-Natal Joint Liaison Committee v Member of the Executive Council, Department of Education, KwaZulu-Natal* 2013 (6) BCLR 615 (CC) ('KZN Joint Liaison Committee'); *Head of Department, Department of Education, Free State Province v Welkom High School*; *Head of Department, Department of Education, Free State Province v Harmony High School* 2013 (9) BCLR 989 (CC) ('Welkom'); *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC) ('Rivonia'); *Federation of Governing Bodies for South African Schools v Member of the Executive Council for Education, Gauteng* 2016 (8) BCLR 1050 (CC) ('FEDSAS'); *Hotz v University of Cape Town* [2017] ZACC 10 ('Hotz')

#### **S 35 Medical treatment for arrested, detained and accused persons (1)**

*Lee v Minister of Correctional Services* 2013 (2) BCLR 129 (CC) ('Lee')